CONSTITUTIONAL CONSIDERATIONS: STATE VERSUS FEDERAL ENVIRONMENTAL POLICY IMPLEMENTATION

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

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C O N T E N T S

CONSTITUTIONAL CONSIDERATIONS: STATE VERSUS FEDERAL ENVIRONMENTAL POLICY IMPLEMENTATION

FRIDAY, JULY 11, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:16 a.m., in room 2123, Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Gingrey, Whitfield, Murphy, Latta, Harper, McKinley, Johnson, Tonko, Green, DeGette, McNerney, Barrow, and Waxman (ex officio).

Staff present: Charlotte Baker, Deputy Communications Director; Sean Bonyun, Communications Director; Leighton Brown, Press Assistant; Allison Busbee, Policy Coordinator, Energy and Power; Jerry Couri, Senior Environmental Policy Advisor; Brittany Havens, Legislative Clerk; Kirby Howard, Legislative Clerk; David McCarthy, Chief Counsel, Environment and the Economy; Tina Richards, Counsel, Environment and the Economy; Chris Sarley, Policy Coordinator, Environment and the Economy; Jessica Wilkerson, Legislative Clerk; Jeff Baran, Democratic Staff Director, Energy and the Environment; Jacqueline Cohen, Democratic Senior Counsel; Caitlin Haberman, Democratic Policy Analyst; and Ryan Schmit, Democratic EPA Detailee.

Mr. SHIMKUS. The subcommittee will now come to order.

The Chair recognizes myself for 5 minutes for an opening statement.

Before I want to start, I want to recognize Mike Pollock, who is our intern from American University. He is in the School of Law. Because when I make my opening statement, you will know that I didn't write it. I am reading it. So I appreciate his work.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Today's hearing gives us an opportunity to discuss some important questions we face as lawmakers. When we create policies to protect human health and the environment, when should we defer to the States? When should policy be set at the national level but implemented at the State level? When should it be implemented at the national level?

At first, different provisions of the U.S. Constitution seem to offer different answers, but our job is to reconcile those provisions. That harmony will not come if we take the easy way out and say, on the one hand, that all these decisions are up to the States or, on the other hand, that what the Federal Government determines should rule, even right down to the most local level, thus making the States mere area offices of the Federal Government.

The Commerce Clause confers enormous power on Congress. Our friend, Rob Meltz, a leading constitutional scholar, will tell us just how sweeping it is and just how broad our options are. But Rob will also help us remember that there is a 10th Amendment to our Constitution's Bill of Rights which reads, and I quote, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

Let's not forget the Bill of Rights was the States' price of ratification. In fact, the States themselves created the Federal Government, but, in doing so, the States did not dissolve themselves.

So what did the States want from a national Government that the Articles of Confederation did not give them? For one, they wanted open interstate trade or, and I quote, "regular commerce." Their vehicle for achieving this was Congress' power to regulate commerce with foreign nations among the several States and with Indian tribes.

During the 1930s, this commerce power was read so broadly by the Supreme Court that it seemed to have no bounds. In fact, a loaf of bread baked and consumed by a farmer using his own wheat was said to be interstate commerce for purposes of Congress' power to regulate it.

By the late 1990s, the Supreme Court began to rediscover some limits on the Commerce Clause. The Lopez decision, which we will ask Rob Meltz to explain, seemed to focus on Congress' power under the law more than on its reach. That case established that only economic activity may have a substantial effect on interstate commerce to be regulated by the Commerce Clause.

So when we look at environmental policy and commerce regulation, we see an interesting mosaic. If someone tosses litter out his window, the punishment is entirely between him and the county sheriff applying State or local law. But when the sheriff records the time of the offense on the citation, he uses a time set by the Federal Government under the Standard Time Act of 1918, a law our committee amended in 2005 for daylight savings.

Drugs and medical devices, among many others, are regulated at the national level, in part because they are important but also because, once approved, they need to flow freely in interstate commerce. Consumers and the whole economy benefit enormously from a single market for these and other products that are made in one State, sold in another, and used in still others.

Professor Revesz described this as capturing economies of scale. Mass production, which makes so many of our everyday goods more economical, is pretty hard to do if each State demands its own custom batch.

Free trade among States leads also to free trade with foreign countries. When we work out international trade agreements that

give our products, such as corn growers, access to foreign markets, part of the deal sometimes includes allowing those countries access to our markets. That access is hollow if States have the option of closing off trade on their own. As a prior witness put it, the price of admission to the international trade negotiations is "one country, one voice."

So, in my view, where Congress has the inherent capability to protect health and the environment, we in Congress should defer to them. We in Congress must also have a rationale to step in where a State is not constituted to take the steps it needs to achieve that protection. And I believe we have a basis to step in where impacts are multi-State and doing so will facilitate trade in goods and services among States and internationally.

And then there is the middle ground, where either leaving the job entirely to the Federal or the State Government is not warranted. Sometimes Congress sets national standards to be fair among the States but leaves implementation of those national standards to the States.

How stringent such Federal standards should be and whether benefits should outweigh the costs are all questions for another hearing. For today, we are only asking when should Congress consider acting and who should be the regulator. At our next hearing on July 23rd, we invite EPA, the States, and others to discuss steps to modernize State and Federal cooperation. Today, we will focus on the constitutional underpinnings of those basic decisions.

We appreciate all our witnesses appearing today and look forward to your testimony.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

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At first, different provisions of the U.S. Constitution seems to offer different answers. But our job is to reconcile those provisions.

That harmony will not come if we take the easy way out and say, on the one hand, that all these decisions are up to the States or, on the other hand that what the Federal Government determines should rule, even right down to the most local level, thus making the States mere area offices of the Federal Government.

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"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

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At our next hearing on July 23 we invite EPA, the States, and others to discuss steps to modernize State and Federal cooperation. Today, we will focus on the Constitutional underpinnings of those basic decisions.

We appreciate all our witnesses appearing today and look forward to your testimony.

Mr. SHIMKUS. With that, I yield back my time and recognize the gentlemen from New York, Mr. Tonko, for 5 minutes.

OPENING STATEMENT OF HON. PAUL TONKO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TONKO. Thank you, Mr. Chair, and good morning.

Good morning to our witnesses.

The first hearing held by our subcommittee last February was on the same topic that we are going to discuss today, the balance between Federal and State authority. As I pointed out at the start of that hearing, this issue has been part of our national debate since the first Continental Congress. I don't expect we are going to resolve that issue today, if ever.

State and Federal involvement in environmental protection has been a part of our history for much longer than the past 70 or 80 years. Congress established our first national park, Yellowstone, in 1872 to protect the unique and beautiful landscape and its resources.

Federal involvement in environmental protection increased over the years when it became obvious to the public that individual State action was insufficient to protect essential common resources that were being severely damaged by pollution generated and disposed of by unregulated industrial and other human activities. Resources often are not contained within the border of a single State, especially air and water resources, and pollutants frequently do not respect State boundaries.

Over the course of this Congress, our subcommittee has held hearings on two issues, in particular, that have involved questions of whether the States or the Federal Government should define the floor of environmental and public health protection for citizens: the disposal of coal ash for one, and the regulations of chemicals in Congress for another.

In both cases, the current level of guaranteed Federal protection is very low. This is especially true in the case of coal-ash disposal, a practice that for all intents and purposes is regulated by individual States. The failures of coal-ash disposal facilities that communities have experienced in recent years and the risk to the air and water resources are a clear demonstration of the hazardous situation being created by insufficient monitoring and insufficient regulation.

In the case of chemicals, the Federal law governing industrial chemicals has failed to generate basic information about hazards and exposure for the vast majority of chemicals that we are exposed to each and every day. In fact, we do not even have reliable information about how many chemicals are actually in use. Very few have been regulated or restricted through application of TSCA.

In the absence of a credible Federal program and in the face of evidence of increased exposure and risk of chemicals, States have responded to their citizens' demands for action. We need Federal laws to set strong standards to ensure all of our citizens a basic level of health, safety, environmental quality, and opportunity.

But that does not mean that individual States should be prevented from exercising their authority to act on behalf of and in response to the desires of their citizens. States should be able to go beyond Federal law and offer additional protections to address unique situations or to safeguard unique resources. And the model of Federal standards-setting with State-based implementation has worked well, giving States the flexibility to tailor requirements to their specific circumstances.

Through State and Federal environmental programs, we have fostered a dynamic economy and a healthy and clean environment. We need to build on the progress we have made, and we can do that with a strong partnership amongst the Federal Government and our States.

We have a very able and distinguished panel of witnesses, and I look forward to your testimony. And I want to thank all of you for participating in today's hearing, which will provide valuable direction and insight into the issues we address. Thank you so much.

And, with that, Mr. Chairman, I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

Does anyone on the majority side seek time?

If not, the Chair recognizes the gentleman from California, the ranking member of the full committee, Mr. Waxman, for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman.

Two weeks ago, we marked a grim milestone. The House of Representatives took its 500th anti-environmental vote since the Republicans took control. With the Energy and Water Appropriations bill on the floor this week, the tally, I am sure, is now even higher.

This hearing examines what the Constitution has to say about State and Federal authority to protect the environment. Unfortunately, House Republicans appear more interested in weakening existing environmental protections than in using our constitutional authority to ensure that all Americans, wherever they may live, can breathe the air, drink the water, and avoid exposure to toxic chemicals.

In February of this year, a stormwater pipe under a retired coal-ash impoundment in North Carolina collapsed. It released up to 82,000 tons of coal ash and 27 million gallons of contaminated water. The effects of the spill were visible across 70 miles of the Dan River, crossing from North Carolina into Virginia, and affecting drinking-water sources for the citizens of Danville, Virginia, and Virginia Beach.

This is just the latest coal-ash spill to pollute drinking-water sources and damage resources across State lines. According to a recent estimate, the economic impacts of this spill could exceed $70 million. For the recreation industry around Danville, Virginia, the impact could even be more severe if the river loses its designation as a scenic river.

There is no question that water pollution, air pollution, and toxic chemicals cause widespread economic harm. It is also clear that Congress has the authority under the Constitution and responsibility to address risks from pollution. Courts have repeatedly upheld environmental statutes as appropriate exercises of our commerce power.

Over the years, Congress and States have developed and refined a proven model of cooperative federalism which has successfully reduced air and water pollution and ensured the public's access to safe drinking water. Under this model, Congress sets minimum national standards of environmental protection. States may take responsibility for implementing and enforcing these standards if their requirements are at least as protective as the Federal floor. EPA retains backstop enforcement authority, ensuring that every citizen in the United States receives a minimum level of protections from environmental risks. And States retain the authority to establish more protective standards and programs to meet their own individual circumstances.

At a hearing in this subcommittee last year, stakeholders told us that protecting the environment through cooperative federalism is working. States are implementing over 96 percent of the environmental programs that can be delegated by the Federal Government

to the States. These programs have an impressive track record of protecting Americans.

Despite this record of success, the majority has continued to pursue proposals that would upend this proven model, although there is no consistency in their approach. A core Federal responsibility is protecting one State from pollution of another. Well, that makes sense; we have to deal with cross-State boundaries, and pollution doesn't respect those boundaries. Yet this committee has voted over and over again to block EPA regulations that would do exactly this.

EPA promulgated regulations to reduce power-plant emissions that pollute the air in downwind States. Well, that makes sense. But the House Republicans voted to block implementation of those standards. The States can't deal with it by themselves if they are subject to downwind pollution, so they have to look to the other State to cooperate.

EPA issued standards to reduce mercury and other toxic air pollutants from power plants. That pollution crosses State boundaries and is a national problem. Our Republican majority voted to block those important public health standards, as well.

This hearing should remind us again that protecting public health and the environment works best when both the Federal Government and State Governments contribute. If not, polluting industries will play one State off another so that every State is forced to reduce their pollution protection for their citizens for fear that they will lose the jobs and industry will locate elsewhere.

Thank you, Mr. Chairman, for this opportunity to make this opening statement.

Mr. SHIMKUS. The gentleman yields back his time, and I thank the gentleman.

Now we are going to go right to our panel. I will do an introduction, and then I will turn to you for your opening statement. I will do an introduction of the whole panel.

First of all, we have Robert Meltz. He is with the American Law Division of the Congressional Research Service, a service that we rely on a lot. And we appreciate you being here. Jon Adler, who is a professor of law at Case Western School of Law. We have Richard Revesz, who is from New York University School of Law. Thank you, sir. And Rena Steinzor, who is a professor at the University of Maryland School of Law. She has been here numerous times, and we thank her for coming back.

The ranking member helped set this debate, and I appreciate his comments. Again, what we asked was, when should Congress consider acting, and who should be the regulators, the question we posed.

With that, I will start with Mr. Meltz. Sir, your full statement is entered into the record, and you have 5 minutes.

And hit the microphone, and then pull it close so that it can get to the transcriber.

Mr. MELTZ. Is it on now?

Mr. SHIMKUS. Yes, but pull it close like you want to eat it.

STATEMENTS OF ROBERT MELTZ, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE; JONATHAN H. ADLER, JOHAN VERHEIJ MEMORIAL PROFESSOR OF LAW AND DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION, CASE WESTERN UNIVERSITY SCHOOL OF LAW; RICHARD REVESZ, LAWRENCE KING PROFESSOR OF LAW AND DEAN EMERITUS, NEW YORK UNIVERSITY SCHOOL OF LAW; AND RENA STEINZOR, PROFESSOR, UNIVERSITY OF MARYLAND SCHOOL OF LAW, AND PRESIDENT, CENTER FOR PROGRESSIVE REFORM

STATEMENT OF ROBERT MELTZ

Mr. MELTZ. Mr. Chairman and members of the subcommittee, CRS is pleased to assist the subcommittee with its inquiry into the appropriate allocation of responsibilities in Federal environmental programs between Federal and State Governments.

I am an attorney with the American Law Division of CRS, where I specialize in environmental law. I am going to summarize my formal statement, reviewing the constitutional constraints imposed on Congress by current Commerce Clause and 10th Amendment jurisprudence in crafting environmental legislation.

To cut to the chase, the Commerce Clause and the 10th Amendment, as currently construed by the Supreme Court, impose as a practical matter few significant constraints on Congress' legislating in the environmental area. I will start with Congress' power to regulate commerce among the several States, the basis of not only most Federal environmental laws but also much of the social and economic legislation enacted by Congress.

Supreme Court decisions hold that Congress' commerce power allows it to regulate the channels and the instrumentalities of interstate commerce and, by far the most debated category, activities, even intrastate activities, that substantially affect interstate commerce either individually or in the aggregate.

The Court has strongly suggested that only economic activity may be aggregated to show a substantial effect on interstate commerce, but what is economic is very broadly construed—not so broadly, however, as to have kept the Court from invalidating congressional enactments in 1995 and 2000, triggering speculation that certain Federal environmental laws might being on precarious constitutional footing, though in 2005 the speculation subsided a bit when a Supreme Court decision stressed that even noneconomic intrastate activity can be regulated by Congress if failure to do so would undercut interstate regulation.

Federal environmental laws, by and large, have fared well against Commerce Clause challenges. After the Supreme Court's decisions in 1995 and 2000, the vulnerabilities were suggested in the non-intrastate applications of several of these laws: the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Superfund Act, and the Endangered Species Act. Yet the overwhelming majority of Commerce Clause challenges to Federal environmental laws were rejected by the lower courts, six out of six in the case of the Endangered Species Act, all with cert denials by the Supreme Court.

Some of these decisions arguably are hard to reconcile with the Supreme Court's Commerce Clause jurisprudence. To hazard a theory, it may be that the courts implicitly recognize the nationwide interconnectedness of environmental problems and the consequent need for broad Federal involvement. Or perhaps the courts simply are not ready to chip away at Federal environmental laws on the chance it would open to Commerce Clause attack other areas of Federal law, such as the civil rights laws and criminal laws.

Turning to the 10th Amendment, that amendment says that the powers not delegated to the Federal Government are reserved to the States or to the people. During the same period when the Court was setting out Commerce Clause limits on Federal power, it came to see in the 10th Amendment a bulwark of State sovereignty. Supreme Court decisions during this time, the 1990s, held that Congress can compel actions of State legislatures or actions of State executive branch officials in their sovereign capacity.

At the same time, the Supreme Court has been explicit that Congress may constitutionally encourage, though not compel, States to participate in Federal environmental programs. Congress may attach conditions on States receiving Federal money, with some constraints. Congress may offer States a choice between regulating according to Federal standards or having State law preempted by Federal regulation or having a Federal plan imposed, as by EPA.

Congress also may authorize sanctions triggered by State inaction but applying solely to private activity, such as the emission offset sanction in the Clean Air Act. And the 10th Amendment is not implicated when the State itself engages in an activity that Congress legitimately may regulate, as when a county operates a solid-waste landfill. As with the Commerce Clause, 10th Amendment challenges to Federal environmental laws have rarely succeeded.

So, in sum, Federal environmental programs largely have withstood both Commerce Clause and 10th Amendment challenge. And, barring a shift in the jurisprudence, the key considerations in how to divide Federal and State responsibilities in a Federal environmental program are likely to fall in the policy realm rather than the constitutional one.

Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Mr. Meltz follows:]

Statement of Robert Meltz
Legislative Attorney
Congressional Research Service

Before the House Committee on Energy and Commerce
Subcommittee on Environment and the Economy

Hearing on
Constitutional Considerations: States vs. Federal Environmental Policy Implementation

July 11, 2014

Mr. Chairman and Members of the Subcommittee: the Congressional Research Service is pleased to assist the subcommittee with its inquiry into the appropriate allocation of responsibilities in federal environmental programs between the federal and state governments. I am an attorney with the American Law Division of CRS, where I specialize in environmental law. As requested, this statement provides an overview of the constraints imposed on Congress in crafting environmental legislation based on the Commerce Clause and Tenth Amendment of the U.S. Constitution.[1] As part of that overview, the statement highlights the measures Congress constitutionally can and cannot adopt when it seeks to enlist state efforts in carrying out federal environmental programs. The statement does not extend to other constitutional provisions pertinent to federal versus state environmental regulation (such as the dormant commerce clause), nor to the myriad of nonconstitutional considerations relevant to a congressional allocation of federal and state responsibilities.

Commerce Clause

Generally

The Commerce Clause of the Constitution bestows upon Congress the power "[t]o regulate Commerce ... among the several States ...."[2] As the basis for much of the environmental, social, and economic legislation enacted by Congress, the scope of this power is of more than passing interest.

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[1] *See also* CRS Report No. RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.
[2] Art. I, § 8, cl. 3.

Beginning in the 1930s, the Supreme Court adopted an expansive view of that scope,[3] in part reflecting a view that its earlier decisions had "artificially ... constrained the authority of Congress to regulate interstate commerce."[4] Indeed, from 1937 until 1995, the Court rebuffed every Commerce Clause challenge to federal statutes.

In 1995, Congress' winning streak came to a halt. In *United States v. Lopez*,[5] the Supreme Court voided a conviction under the Gun-Free School Zones Act as beyond Congress' commerce power. The Court identified three categories of activity reached by the Commerce Clause – the now-canonical test.[6] First, *Congress may regulate use of the channels of interstate commerce*. Second, *Congress may regulate and protect the instrumentalities of, or persons or things in, interstate commerce,* even though the threat may come only from intrastate activities. And third, *Congress may regulate activities, even intrastate ones, that alone or in the aggregate "substantially affect" interstate commerce.*

The last, "substantial effect" category is the most complex and most manipulable. In *Lopez*, the Court strongly suggested that only *economic* activity may be aggregated to establish a substantial effect.[7] Also, it helps if there is a jurisdictional element in the statute to ensure that the covered activities affect interstate commerce. And while there need be only a rational basis to support the substantial effect, the link to interstate commerce may not be "attenuated." On the other hand, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[8] Finding that possession of a gun in

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[3] The key decision ushering in the modern period of expansive Commerce Clause interpretation is *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). There, the Court rejected its previous distinction between "direct" and "indirect" effects on interstate commerce, recasting the Commerce Clause inquiry as whether the intrastate activities "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce ...." *Id.* at 36-38.

[4] United States v. Lopez, 514 U.S. 549, 556 (1995).

[5] 514 U.S. 549.

[6] *Id.* at 558-559.

[7] *Id.* at 560.

[8] *Id.* at 558 (other italics omitted).

a schoolyard lay outside the "substantial effect" category (the only one that applied), Lopez' conviction was reversed.

In 2000, the Court in *United States v. Morrison*[9] again held that Congress had exceeded its commerce power—this time in creating the federal civil remedy in the Violence Against Women Act. As in *Lopez,* the Court focused on the noneconomic nature of the federally proscribed activity in refusing to aggregate impacts on interstate commerce under the "substantial effect" category.[10] The Court was not deterred by the numerous statutory findings as to the impact of gender-based violence on interstate commerce, reasoning that allowing aggregation of intrastate noneconomic activities such as violence against women on a "but for" basis would also allow congressional regulation of many other areas (crimes generally, family law) of traditional state regulation.[11] After *Morrison*, the Court has construed federal statutes narrowly at least in part to avoid questions as to their possible invasion of intrastate realms beyond Congress' commerce power.[12]

The overruling of congressional enactments in *Lopez* and *Morrison* aroused the concern of some that the Supreme Court was looking to shrink the commerce power. Yet even at the time of these decisions, it was plain they did not overrule any of the Court's prior Commerce Clause decisions. The Court even cited with approval *Wickard v. Filburn,*[13] a 1942 decision widely seen as the pinnacle of its expansive Commerce Clause jurisprudence. *Lopez* and *Morrison* are thus best regarded not as a retrenchment, but rather as a clarification of where the line has long been, and a warning that the line will not be shifted further toward federal power.

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[9] 529 U.S. 598 (2000).

[10] "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity ... , thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613.

[11] *Id.* at 615-616.

[12] Jones v. United States, 529 U.S. 848 (2000) (federal arson statute); Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (federal statute creating permit program for discharges into "isolated waters").

[13] 317 U.S. 111 (1942).

Following *Lopez* and *Morrison*, the Supreme Court has handed down two additional Commerce Clause decisions that suggest, or at least do not undermine, the view that it is not looking to shrink congressional power. In *Gonzales v. Raich*, the "substantial effect" prong of the commerce power was yet again pivotal.[14] There, the Court sustained the use of the federal Controlled Substances Act to prohibit the intrastate, non-commercial manufacture and possession of marijuana for medicinal purposes in accordance with California law. As with the wheat grown for home consumption in *Wickard*, the marijuana grown for home use in *Raich* was seen by the Court, in the aggregate, to have substantial effects on interstate commerce in marijuana. Said the Court: *Congress "can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity"*[15] More broadly, the Court was explicit that *Lopez* and *Morrison* "[preserved] modern-era Commerce Clause jurisprudence."[16] The second Commerce Clause decision since *Lopez* and *Morrison* was *National Federation of Independent Business v. Sebelius*,[17] a narrow ruling that the Commerce Clause does not extend to the federal regulation of *inactivity*.

Congressional Findings

Worth highlighting in these decisions are the Court's assertions as to the role of congressional findings in a statute or its legislative history. On the one hand, the Court is clear that while "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce ... ,"[18] such findings are "helpful ... particularly when the connection to commerce is not self-evident ...."[19] On the other hand, congressional findings are not sufficient, by themselves, to

[14] 545 U.S. 1 (2005).
[15] *Id.* at 18.
[16] *Id.* at 23.
[17] 132 S. Ct. 2566 (2012).
[18] *Lopez*, 514 U.S. at 562.
[19] *Raich*, 545 U.S. at 21.

establish Commerce Clause legitimacy. Whether particular activities fall within the Clause is "ultimately a judicial rather than a legislative question."[20]

Effect of Necessary and Proper Clause

One might suppose that the enumeration of Congress' powers in Article I, section 8, reasonably implies that Congress has the power to pass laws effecting those powers. Nonetheless, the Constitution includes a separate clause expressly stating that Congress has the authority to "make all Laws which shall be necessary and proper" for that purpose.[21] This Necessary and Proper Clause has been integral to courts reaching a broad interpretation of other congressional powers, such as the Commerce Clause.

The fact that the role of the Necessary and Proper Clause may not be mentioned in a given decision, or mentioned only in passing, has obscured its historical significance in Commerce Clause litigation. Justice Scalia noted in his *Raich* concurring opinion that it is more accurate to view the expansive "substantial effects" prong of Commerce Clause analysis as rooted in the Necessary and Proper Clause.[22] Indeed he went further, arguing that the Necessary and Proper Clause can go beyond the Commerce Clause framework to regulate even those intrastate activities that do not themselves substantially affect interstate commerce.[23] Perhaps, he suggested, this explains *Raich's* acceptance of congressional authority over noneconomic, intrastate activities lacking substantial effect on interstate commerce where they are "an essential part of a larger congressional regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[24]

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[20] *Morrison*, 529 U.S. at 614.
[21] Art. I, § 8, cl. 18.
[22] 545 U.S. at 33-39 (Scalia, J., concurring).
[23] *Id.* at 37.
[24] *Id.* at 36.

Commerce Clause Challenges to Federal Environmental Statutes

Soon after the *Lopez* decision, concerns were raised that some federal environmental statutes might be on shaky Commerce Clause footing.[25] Vulnerabilities were suggested in the Superfund Act, as to cleanup sites where the contamination remains within one state;[26] the Clean Water Act, as to the assertion by the Corps of Engineers and EPA of jurisdiction over "isolated waters";[27] the Safe Drinking Water Act, regarding publicly owned drinking water systems providing service within one state;[28] and the Endangered Species Act, as applied to species located entirely within one state and affected by noneconomic activity.[29]

The vast majority of federal environmental provisions seems to be on commerce power terra firma—that is, under current Supreme Court interpretation. Either the activity regulated is an economic one that, alone or in the aggregate, has substantial effect on interstate commerce (e.g., industrial activity causing air pollution), or the statute is explicit that it reaches only activities in or affecting interstate commerce,[30] or there are plausible congressional findings that the regulated activity affects interstate commerce.[31] Moreover, case law indicates that the concept of economic activity, the prerequisite for aggregating the interstate impacts of intrastate activity, is to be broadly construed[32]—though undeniably

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[25] *See, e.g., The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENVTL. L. RPTR. 10421 (1995); J. Blanding Holman, Note, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L. J. 139 (1995).

[26] More formally, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675.

[27] 33 C.F.R. § 328.3(a)(3) (Corps of Engineers); 40 C.F.R. § 230.3(s)(3) (EPA). In these identical regulations, the agencies define their jurisdiction under the Clean Water Act to reach waters that are not traditional navigable waters, are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters, but "the use, degradation, or destruction of which could affect interstate ... commerce ...." These waters are popularly referred to as "isolated waters," though the phrase is not used in the Clean Water Act or regulations themselves.

[28] 42 U.S.C. §§ 300f through 300j-26.

[29] 16 U.S.C. §§ 1531-1544.

[30] *See, e.g.,* Federal Hazardous Substances Act, 15 U.S.C. § 1263; Toxic Substances Control Act, 15 U.S.C. § 2602(3)-(4); Migratory Bird Treaty Act, 16 U.S.C. § 705; Clean Air Act, 42 U.S.C. § 7511b(e)(1)(C); Clean Water Act, 33 U.S.C. § 1342(a); Hazardous Materials Transportation Act, 49 U.S.C. § 5102(1).

[31] *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. § 2601(a)(3); Marine Mammal Protection Act, 16 U.S.C. § 1361(5).

[32] *See, e.g.,* Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000) ("The *Lopez* Court's characterization of the regulation of homegrown wheat in *Wickard* ... as a case involving economic activity makes clear the breadth of this concept.").

amorphous.[33] Finally, the Court has cautioned that congressional enactments should be judicially invalidated only upon "a plain showing" that Congress exceeded its constitutional bounds.[34]

Consistent with this reasoning, CRS is aware of only a few successful Commerce Clause challenges to federal environmental statutes following *Lopez*—continuing the pre-*Lopez* pattern.[35] Lower courts since *Lopez* have rejected Commerce Clause challenges to the Superfund Act,[36] Clean Air Act,[37] Clean Water Act,[38] Endangered Species Act,[39] Migratory Bird Treaty Act,[40] and Eagle Protection Act. Decisions under the Endangered Species Act (ESA) are the most numerous, each finding that the act is, in the words of *Lopez*, a "general regulatory statute [that] bears a substantial relation to commerce."[41] Thus, said the most recent decision (quoting *Raich*), even though the ESA might

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[33] In his majority opinion in *Lopez*, Chief Justice Rehnquist noted this problem: "Admittedly, a determination whether intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." 514 U.S. at 566. *See, e.g.*, United States v. Gregg, 226 F.3d 253 (3d Cir. 2000) (majority and dissenting opinions reach opposite conclusions as to whether protesters at abortion clinics are engaged in "economic" activity for purposes of Commerce Clause analysis).

[34] *Morrison*, 529 U.S. at 607.

[35] Prior to *Lopez*, the Supreme Court itself rejected Commerce Clause attacks on the Surface Mining Control and Reclamation Act, *Hodel v. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and the rails-to-trails program, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). In the former ruling, the Court also noted its agreement with lower-court decisions "that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel*, 452 U.S. at 282 and n.21 (1981). In contrast, and also in the pre-*Lopez* period, EPA's asserted Clean Water Act jurisdiction over isolated waters was held outside the Commerce Clause in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992), *vacated on other grounds*, 999 F.2d 256 (7th Cir. 1993). *See* note 27 *supra*.

[36] *See, e.g.*, USA v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997); United States v. NL Industries, Inc., 936 F. Supp. 545 (S.D. Ill. 1996).

[37] *See, e.g.*, United States v. Ho, 311 F.3d 589 (5th Cir. 2002); Allied Local and Regional Mfrs. Caucus v. US EPA, 215 F.3d 61 (D.C. Cir. 2000).

[38] United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997). See, however, *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), where the court invalidated as unauthorized by Clean Water Act section 404 a Corps of Engineers regulation asserting jurisdiction over wetlands the use of which merely "could," as opposed to "did," affect interstate commerce. *See* note 27 *supra*. The court went on to note in dictum that were this regulation a statute, it would exceed Congress' authority under the Commerce Clause. *See also* text accompanying notes 43-48 *infra*.

[39] Five circuits have addressed post-*Lopez* Commerce Clause challenges to the Endangered Species Act; each has rejected the challenge, though with varying rationales of some inter-circuit inconsistency. San Luis & Delta-Mendota Water Auth., 638 F.3d 1163 (9th Cir. 2011); Alabama-Tombigbee Rivers v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007); Rancho Viejo v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); GDF Realty Investment Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

[40] United States v. Bramble, 103 F.3d 1475 (9th Cir. 1997).

[41] 514 U.S. at 558. *San Luis & Delta-Mendota Water Auth.* provides a review of why, in the view of circuit courts that have ruled on the issue, the protection of endangered and threatened species implicates interstate commerce, even when the species are purely intrastate and have no commercial value. For example, "[a] species might become threatened or

"ensnare[] some purely intrastate activity, ... we refuse to excise individual components of that larger scheme."[42] One may speculate that the center of the Court is not yet ready to take on a body of law such as federal environmental statutes where to do so would open up the federal civil rights laws, many federal criminal statutes, and other federal statutes to Commerce Clause attack.

In 2001, concern as to the Commerce Clause compatibility of some federal environmental laws was stirred anew by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), a statutory construction decision with Commerce Clause undertones.[43] In *SWANCC*, the Court dealt with the Corps' definition of the Clean Water Act jurisdictional phrase "waters of the United States" to include intrastate "isolated waters" "the use, degradation, or destruction of which could affect interstate ... commerce."[44] The Corps read its definition to bring in isolated waters that are or might be used by migratory birds that cross state lines—the much-debated "migratory bird rule." Though the case was decided on statutory grounds—the Clean Water Act, the Court held, did not reach so far—the Commerce Clause heavily influenced the Court's reasoning. Because the migratory bird rule "invokes the outer limits of congressional power," the Court said, "we expect a clear indication that Congress intended that result"—an indication the Court did not find.[45] This concern is enhanced, said the Court, where an agency interpretation "permit[s] federal encroachment upon a traditional state power"[46]—citing the states' "traditional and primary power over land and water use."[47]

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endangered precisely because of overutilization for commercial purposes." 638 F.3d at 1176. And "[t]he genetic diversity provided by endangered or threatened species improves agriculture and aquaculture, which clearly affect interstate commerce." *Id.*

[42] 638 F.3d at 1177 (quoting *Raich*, 545 U.S. at 22).

[43] 531 U.S. 159 (2001).

[44] *See* note 27 *supra*.

[45] 531 at 172. *Accord*, Rapanos v. United States, 547 U.S. 715, 737-738 (2006) (Scalia, J., plurality opinion).

[46] *Id.* at 173. *Accord*, *Rapanos*, 547 U.S. at 737-738.

[47] *Id.* at 174.

Speaking directly to the Commerce Clause, *SWANCC* suggested that the activities that can be aggregated to satisfy the "substantial effect" prong have a tight circumference.[48] There was a tension, the Court said, between the Corps' assertion of jurisdiction over the land in this case based on migratory bird habitat and its later argument during litigation that the regulated activity is the municipal landfill sought to be built there, which is plainly commercial. These dicta cast doubt on whether the economic activity relied on by some lower court Commerce Clause decisions is sufficiently linked to the goals of those statutes to allow aggregation under the "substantial effect" prong. However, no Commerce Clause decision of the Court since *SWANCC* has amplified on these concerns.

Tenth Amendment

Generally

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Once dismissed by the Supreme Court as "but a truism,"[49] the Court today discerns in these words a bulwark of states' rights in our federal-state system of government. On other occasions, the Court has derived the same protection for states' rights by inquiring whether an act of Congress is authorized by one of the powers delegated to Congress in Article I, such as the commerce power. "[T]he two inquiries are mirror images of each other," says the Court.[50]

The invigoration of the Tenth Amendment has played out in cases dealing with Congress' ability to regulate the states *directly* – instances where a federal law mandates an action by a state or state official.[51] Initially, the context was whether Congress could subject states to the same restrictions, such

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[48] *Id.* at 173.
[49] United States v. Darby, 312 U.S. 100, 124 (1941).
[50] New York v. United States, 505 U.S. 144, 156 (1992).
[51] Nothing in this new generation of Tenth Amendment decisions seems to undermine the long-established principle that the amendment does not bar Congress from displacing state police powers regulating private activity. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 292 (1981) (asserting principle).

as employee wage and hour limits, that it applies to private parties. In 1985, the Court concluded that its earlier effort to immunize the "traditional governmental functions" of the states from such federal mandates was "both impractical and doctrinally barren."[52] For the most part, it indicated, states must seek protection from such federal regulation in the political process, not in any limitations imposed by the Tenth Amendment or the Commerce Clause

In contrast, states' rights were unequivocally affirmed when the Court returned to the issue in the 1990s—in a related, but different, context. The new decisions held that *Congress cannot compel actions of state legislatures or state executive-branch officials as part of a Commerce Clause-based federal program. A state cannot be compelled to exercise its authority as sovereign.*[53] The first ruling was in *New York v. United States,*[54] invalidating a federal law requiring that any state failing to provide for permanent disposal of low-level radioactive waste generated within its borders must take title to the waste. The Court famously held that Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[55] In the second decision, *Printz v. United States,*[56] the Supreme Court voided a provision of the Brady Handgun Violence Protection Act requiring the chief law enforcement officer of a local jurisdiction to do a background check on would-be purchasers of handguns. The Brady Act thus commanded such officers to participate in administering a federal regulatory scheme. The Court concluded again, this time in the *executive* branch context, that the United States may not compel state involvement in a federal program. "Congress," said the Court, "cannot circumvent [*New York*'s prohibition on compelling sovereign acts]

[52] Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 557 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976) .
[53] The Court had flirted with the question of compelled state participation earlier, in 1981, and hinted in dictum at its unconstitutionality. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).
[54] 505 U.S. 144 (1992).
[55] *Id.* at 161.
[56] 521 U.S. 898 (1997).

by conscripting the State's officers directly."[57] Importantly, *New York* and *Printz* each make clear that *simply preempting a state law as contrary to federal proscription is permissible—that is, is not to be regarded as direct regulation of the states.*[58]

While barring Congress from "commandeer[ing]" state legislative process, *New York* explicitly blessed as inoffensive to the Tenth Amendment two techniques used in federal environmental statutes and elsewhere to promote, without legally compelling, state participation in federal programs. These techniques, said the Court, allow "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply" with the federal policy preference.[59]

First, *New York* said that *Congress may attach conditions to the receipt of federal funds*,[60] citing the leading Spending Power decision in *South Dakota v. Dole*.[61] This technique comes with a few conditions, however. The conditions "must ... bear some relationship to the purpose of the federal spending," though the Court has not defined how close a relationship is required.[62] Also, the conditions may not be "so coercive as to pass the point at which pressure turns into compulsion,"[63] which would suggest a violation of the Tenth Amendment. The *National Federation of Independent Business v. Sebelius* decision, involving a Spending Power issue under the Affordable Care Act, arguably deals with a specialized case that does not affect *South Dakota v. Dole*.[64]

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[57] *Id.* at 935. In contrast with the state's legislative and executive branches, *Printz* made clear that it *is* permissible for Congress to impose an obligation on state judges to enforce federal prescriptions. *Id.* at 905-907.
[58] *New York*, 505 U.S. at 162; *Printz*, 521 U.S. at 913.
[59] *New York*, 505 U.S. at 168.
[60] *Id.* at 167.
[61] 483 U.S. 203 (1987).
[62] *New York*, 505 U.S. at 167. In *South Dakota v. Dole*, for example, the grant condition on the receipt of highway funds was that the state impose a minimum drinking age of 21. This condition was upheld because it was seen by the Court as related to the national concern of safe interstate travel, which was one of the main purposes for expending federal highway funds.
[63] *South Dakota*, 483 U.S. at 211. Stated the Court: "When we consider ... that all South Dakota would lose if she adheres to [a minimum drinking age less than the congressionally desired one] is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact." *Id.*
[64] *Sebelius*, 132 S. Ct. 2566 (2012). Justice Roberts' controlling opinion in *Sebelius* held that in the special case where the funding of an existing program is conditioned on state adoption *of a new and independent* program, the amount of federal funds at issue cannot be a significant portion of a state's budget such that their withdrawal would be unconstitutionally

Second, *New York* asserted that *Congress may offer states the choice between regulating an activity according to federal standards or having state law preempted by federal regulation.* The Court specifically noted the Clean Water Act, Resource Conservation and Recovery Act, and Alaska National Interest Lands Conservation Act as examples of the preemption route.[65] The Court likely also intended to cover the Clean Air Act, where states are encouraged to develop their own programs chiefly through the device of authorizing EPA to promulgate and enforce a program for the state if the state fails to timely submit one meeting federal standards.[66]

Environmental Cases Following *New York* and *Printz*

Since the *New York* decision in 1992, research reveals only one successful Tenth Amendment challenge to a federal environmental statute. *ACORN v. Edwards*[67] addressed a Safe Drinking Water Act (SDWA) provision that required each state to establish a program, meeting federal standards, to assist schools in remedying potential lead contamination in their drinking water systems. Failure to do so subjected the states to federal civil enforcement. Such "[c]ongressional conscription of state legislative functions," said the Fifth Circuit, "is clearly prohibited under [*New York*] ...."[68] Congress is free to regulate drinking water coolers in interstate commerce directly, but not through the states as conduits to the people. The SDWA provision, it concluded, deprives the state of the option of declining to regulate drinking water systems, and is therefore unconstitutional.

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coercive under the Tenth Amendment. He did not offer a standard to determine what amount of funds would be coercive, but did conclude that withdrawal of federal funds making up 10% of an average state's budget represented a "gun to the head." 132 S. Ct. at 2604-2605. As a point of comparison, the highway funds at issue in *Dole* were less than one-half of one per cent of the state's budget. *Id.*

[65] 505 U.S. at 167-168. The Court did not cite the specific provisions of these statutes it had in mind.

[66] *See, e.g.*, Clean Air Act § 110(c), 42 U.S.C. § 7410(c); Clean Air Act § 111(d)(2), 42 U.S.C. § 7411(d)(2); Clean Air Act § 502(d)(3), 42 U.S.C. § 7661a(d)(3). The second-cited provision, Clean Air Act section 111(d)(2), has received much attention lately. In the event that EPA finalizes its recently proposed regulations limiting carbon dioxide emissions from existing fossil fuel-fired power plants, section 111(d)(2) authorizes EPA to promulgate and enforce a plan in any state that fails to timely submit a satisfactory plan of its own.

[67] 81 F.3d 1387 (5th Cir. 1996).

[68] *Id.* at 1394.

ACORN was an easy case for the challenger. In another post-*New York* decision, the Fourth Circuit in *Virginia v. Browner*[69] failed to find the direct compulsion of state action that the Supreme Court prohibited. *Virginia* was a state challenge to EPA's use of sanctions against the state, required under the Clean Air Act when a state submits an inadequate stationary source permitting scheme. In sustaining EPA's cut-off of certain federal highway funds to the state, the decision echoes the settled view that reasonable conditions on the grant of federal funds are not legally equivalent to compulsion, even when they have significant consequences for a state.[70]

A second federal-environmental-statute technique blessed by *Virginia* is that *Congress may authorize sanctions triggered by state inaction, but applying solely to private activity*. EPA had imposed on the state the Clean Air Act's "offset sanction," under which the quantity of existing emissions that has to be eliminated for every ton of new emissions (from a new factory or modified existing one) was set at 2:1—greater than the ratio that otherwise would apply. While this sanction may burden the state's citizens (individuals proposing to build or modify a factory), the court held that it did not burden the state *as a government*, and thus did not offend the Tenth Amendment.[71]

Third and finally, *Virginia* made explicit what was implicit in *New York*: *Congress may authorize federal implementation of a federally desired program within a state when the state fails to act*.[72] As above, the state is not compelled to regulate. For the same reason, the mirror image of this arrangement is also constitutional: *Congress may provide that a federal program within a state terminates if the state adopts its own program meeting federal criteria*.[73]

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[69] 80 F.3d 869 (4th Cir. 1996).
[70] *Id.* at 881-882.
[71] The highway fund cutoff sanction and the emission offset sanction in the Clean Air Act were also upheld against Tenth Amendment and Spending Clause challenge in *State of Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), *vacated on other grounds*, 109 F.3d 440 (8th Cir. 1997).
[72] 80 F.3d at 882-883 (Clean Air Act federal permit program implementation).
[73] *Id.*, noting approval of this technique in the Surface Mining Control and Reclamation Act by *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Another example is Clean Water Act section 402(b), 33 U.S.C. § 1342(b), authorizing the substitution of federally approved state discharge permitting programs for the existing federal program.

When the State Itself Engages in the Regulated Activity

Congress may regulate a state or political subdivision directly when the state or local authority itself engages in an activity that Congress legitimately may regulate. This may occur, for example, when a county operates a fleet of waste-collection trucks, with their attendant emissions, or a solid waste landfill.[74] Here, federal regulation burdens the state not as a sovereign government, but solely in its "enterprise" capacity. Such burdens do not implicate the federalism concerns raised by federal encroachments on state sovereignty.[75]

A Supreme Court ruling in 2000 affirms this sovereign/enterprise distinction. In *Reno v. Condon*,[76] the Court was faced with a federal statute regulating the disclosure of personal information contained in the records of state motor vehicle departments. Many states sell such information, generating significant revenues. The statute was inoffensive to Tenth Amendment federalism principles, held the Court; it regulates states as *owners* of databases, rather than requiring states in their sovereign capacity to regulate their own citizens.[77] It does not compel states to enact any laws, unconstitutional under *New York*, or require state officials to assist in administering a federal program, unconstitutional under *Printz*. The Court, however, reserved the question of whether Congress may only regulate the states through generally applicable laws that apply to non-state entities as well as states, since the challenged law did not apply solely to states.[78]

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[74] Whether current Tenth Amendment jurisprudence applies to *political subdivisions* of states, as well as to the states themselves, appears not to have been directly addressed by the Supreme Court. However, the plaintiffs in *Printz* were *county* sheriffs.

[75] This state-as-polluter exemption raises serious constitutional questions, however, if broadly construed to embrace state actions or inactions that cause pollution only indirectly, such as building highways. Brown v. EPA, 566 F.2d 665, 672 (9th Cir. 1977).

[76] 528 U.S. 141 (2000).

[77] *Id.* at 151.

[78] *Id.*

Things blur a bit when the act that constitutes the regulated activity is an act of the state government in its sovereign capacity. In *Strahan v. Coxe*,[79] a state's regulation of commercial fishing was held likely to be a "taking" of Northern Right Whales prohibited under the Endangered Species Act. Here, said the court, it is proper to conclude that the state's scheme cannot continue insofar as it is inconsistent with the preemptive federal act. As long as the court's order does not command specific regulatory action by the state, it will be held not to have "commandeered" the state government—as forbidden by *New York*. Thus, the court could order the state to consider means by which fishing practices might be modified to avoid authorizing takings in state waters, but could not order the state to adopt specific modifications.

Summary

Based on Supreme Court decisions adjudicating the reach of the Commerce Clause of the Constitution, Congress may address environmental problems by regulating use of the channels on interstate commerce; the instrumentalities of, or persons or things in, interstate commerce; and (most debated) activities, even intrastate ones, that alone or in the aggregate "substantially affect" interstate commerce. Currently, only economic activity may be aggregated to establish a substantial effect. Also, Congress can regulate purely intrastate activities, even if not commercial and lacking substantial effect on interstate commerce, if not doing so would undercut regulation of interstate commerce. This expansive reading of Congress' commerce power may in part be based on the Necessary and Proper Clause. Given this broad reading, the overwhelming majority of Commerce Clause challenges to federal environmental programs have been rebuffed by the courts; research reveals successful suits only in response to federal assertions of Clean Water Act jurisdiction over "isolated waters."

[79] 127 F.3d 155 (1st Cir. 1997).

Based on Supreme Court decisions adjudicating the meaning of the Tenth Amendment, Congress may not seek to enlist the participation of states in federal environmental programs by mandating actions of state legislatures or state executive-branch officials in their sovereign capacity—the "anti-commandeering" principle. However, Congress may enlist the participation of states by attaching conditions to the receipt of federal funds (with some constraints), and by offering states a choice between regulating an activity according to federal standards or having state law preempted by federal regulation. This last option includes authorizing federal creation and implementation of a program within a state when the state fails to act. A circuit court also holds that Congress may authorize sanctions triggered by state inaction if applied solely to private activity, since state sovereignty is not thereby infringed. Nor is state sovereignty implicated when Congress regulates state or local government activities that Congress may legitimately regulate if conducted by a private entity. Only one federal environmental program, imposing penalties on states failing to adopt certain drinking water programs, is known to have been struck down on Tenth Amendment grounds.

Mr. SHIMKUS. Thank you, sir.

The Chair now turns to Mr. Adler. Sir, you are recognized for 5 minutes.

STATEMENT OF JONATHAN H. ADLER

Mr. ADLER. Thank you, Mr. Chairman and members of this committee. I appreciate the opportunity to address the constitutional constraints on environmental regulation, a subject which I have studied now for close to 2 decades.

It is a fundamental principle of our constitutional order that the Federal Government is one of limited and enumerated powers, and those powers not delegated to the Federal Government are reserved to the States and to the people.

All Federal laws, no matter their value or purpose, must be enacted pursuant to the Federal Government's enumerated powers and may not transgress other constitutional constraints. This is true whether we are talking about national security, health care, or environmental protection.

While Federal power is broad—and it certainly is, especially as interpreted by the Court's precedents—it is not infinite. The Supreme Court has made clear, including in very recent cases such as NFIB v. Sebelius and in the unanimous judgment this spring in Bond v. United States, that it will enforce limits on Federal power, it will invalidate laws that exceed those constitutional limits, and it will also construe statutes narrowly if that is necessary to avoid difficult constitutional questions—something the Supreme Court has done twice with the Clean Water Act when regulations reaching wetlands and intrastate waters pushed the bounds of Federal authority to regulate commerce among the States.

Several environmental statutes and regulations, both on the books and proposed, raise serious constitutional questions that courts will have to address in the wake of decisions like NFIB, and these are also questions that Congress should consider. Because whether a statute or a regulation is constitutional is not solely a question for the courts; it is also a question for the legislative branch and something the legislative branch should consider when evaluating proposals for legislation.

Now, constitutional limits on Federal power need not come at the expense of environmental protection. The division of authority between the Federal and State Governments counsels that Congress think careful about the nature and scope of Federal environmental regulation. Fiscal constraints and the inherent limits of centralized regulatory structures reinforce the wisdom of focusing Federal efforts on those areas where the Federal Government may do the most good.

The EPA cannot and should not try to address every environmental problem or concern that this Nation faces. It has neither the time nor the resources to do so. The Federal Government should instead concentrate its efforts in those areas where the Federal Government has a comparative advantage or where the separate States are unlikely to be able to address environmental concerns adequately.

This is true in the case of interstate spillovers. This is true in cases where there are serious economies of scale in Federal inter-

ventions. It is not true in the context of localized environmental problems that have relatively localized causes and localized effects. And if one looks at the U.S. Code, that describes much of Federal environmental regulation.

When it comes to developing and enforcing environmental standards for localized environmental concerns, the case for Federal intervention is comparatively weak. And if we want the Federal Government to do more to address things like interstate spillovers where there are economies of scale, we have to think seriously about what we might take off the EPA's plate so that it has the time and the resources to address these new and emerging problems.

And it is not coincidental that the Constitution constrains Federal efforts to reach some localized environmental concerns. There are some environmental problems that are very real but that do not contain the necessary connection to commerce or to other nexuses of Federal power to justify the exercise of Federal regulatory authority.

Again, however, constitutional constraints need not compromise environmental protection any more than constitutional constraints compromise our Nation's ability and efforts to protect our national security or advance other important goals.

Insofar as the Constitution encourages policymakers to think carefully about the comparative strengths and weaknesses of Federal intervention, it may actually enhance this Nation's system of environmental protection, as it helps ensure that Federal resources are focused and targeted in those areas where Federal intervention can do the most good.

Thank you again for your invitation today, and I look forward to any questions you might have.

[The prepared statement of Mr. Adler follows:]

CASE WESTERN RESERVE
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CONSTITUTIONAL CONSIDERATIONS:
STATE VS. FEDERAL ENVIRONMENTAL POLICY IMPLEMENTATION

Prepared Statement of

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Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives

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Mr. Chairman, Representative Tonko, and members of this subcommittee, thank you for the invitation to testify on constitutional considerations that should inform the allocation of responsibility for environmental protection between the federal and state governments. My name is Jonathan H. Adler and I am the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law where I teach courses in constitutional, environmental, and administrative law. I am also a Senior Fellow at the Property & Environment Research Center, an environmental think tank headquartered in Bozeman, Montana.

The subject of federalism in environmental policy has been a major focus of my academic work. For over twenty years I have researched and analyzed federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. My research has addressed both the constitutional limitations on environmental regulation as well as the policy considerations that should inform jurisdictional choice in environmental law. My testimony today draws heavily on this research and my academic publications on federalism and environmental policy. I have listed these articles in an appendix to my testimony and would be happy to provide copies of any of these works to the subcommittee if they would be of use.

Overview

Both the federal and state governments play a role in environmental protection. Each has a comparative advantage in addressing particular types of environmental concerns. Apart from such policy considerations, however, the U.S. Constitution also constrains the sorts of environmental policies that may be adopted by each level of government. It is a fundamental principle of our constitutional order that the federal government is one of limited and enumerated powers, and that those powers not delegated to the federal government are reserved to the states and the people. All federal laws, no matter their value or purpose, must be enacted pursuant to the federal government's enumerated powers and may not transgress other constitutional constraints. This is as true for environmental protection as it is for national security or health care.

The constitutional system of "dual sovereignty" limits federal power and recognizes the "separate and independent autonomy" of the states.[1] At the same time, our federalist system constrains what states may do, through both express and implied structural limits on state authority. As a consequence, not every level of government may enact every potentially desirable for environmental protection. Rather, our constitutional structure leaves both the federal and state governments with realms in which they may operate to advance environmental goals while simultaneously providing for some degree of interjurisdictional competition among and between the several states.

Constitutional limits on federal power need not come at the expense of environmental protection. The division of authority between the federal and state governments counsels that Congress think carefully about the nature and scope of federal environmental regulation. Fiscal constraints and the inherent limits of centralized regulatory structures reinforce the wisdom of focusing federal efforts in those areas where the federal government may do the most good. Specifically, the federal government should concentrate its efforts in those areas where the federal government has a comparative advantage or where the separate states are unlikely to be able to address environmental concerns adequately. For instance, there is a compelling case to made that the federal government should take the lead in addressing interstate spillovers. Downstream and downwind jurisdictions should not be at the mercy of their upstream and upwind neighbors. Further, there is a powerful case to be made that the federal government should exercise leadership in scientific research on the nature and scope of environmental concerns and, in some areas, provide incentives for the development of environmentally friendly technologies. When it comes to developing and enforcing environmental standards for localized environmental concerns, however, the case for federal intervention is comparatively weak. Not coincidentally, the constitution constrains federal efforts to reach some localized environmental concerns. Again, however, such constraints need not compromise environmental protection. To the contrary, insofar as the constitution encourages policy makers to think carefully about the comparative strengths and weaknesses of federal intervention, it may actually enhance this nation's system of environmental protection.

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[1] *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

Limited and Enumerated Federal Powers

A core component of the constitutional structure is the idea that the powers of the federal government are limited to those enumerated in the Constitution itself. As Chief Justice John Marshall explained in *Marbury v. Madison*: "The powers of the legislature are defined and limited; and that those limits may not be mistake and forgotten, the constitution is written."[2] This principle has been reaffirmed by the Supreme Court from early years of the Republic to the present day, including the Supreme Court's recent decisions in *NFIB v. Sebelius* and *Bond v. United States*.[3]

Most of the federal government's powers are enumerated in Article I, section 8.[4] These include the powers to borrow and coin money, establish uniform laws governing naturalization and bankruptcy, and – most significantly for the regulation of energy and environmental concerns – the power to regulate commerce "among the several States." Article I, section 8 also authorizes Congress to "lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States." As interpreted by the courts, this empowers Congress to fund those projects and programs that Congress believes will advance the "general Welfare" of the United States.[5] Further, the Constitution also vests Congress with the power to "make all Laws which shall be necessary and proper for carrying into execution" the other powers enumerated in the Constitution.

Taken together, these powers grant Congress ample authority to address many environmental concerns. Such authority is not unlimited, however, and Congress must remain cognizant of the real constitutional constraints on federal regulatory power. As Chief Justice Roberts emphasized in *NFIB v. Sebelius*, "If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution."[6]

The Supreme Court's recent federalism jurisprudence has two distinct strains. The first focuses on the federal government's enumerated powers. These cases ask whether a given federal statute represents a proper exercise of one of Congress's enumerated powers. In

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[2] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistake and forgotten, the constitution is written.").

[3] *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2577 (2012) ("The federal government 'is acknowledged by all to be one of enumerated powers.'") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)); Bond v. U.S., 134 S. Ct. 2077, __ (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder").

[4] Other powers may be found in the enforcement clauses of the Civil War Amendments, including the 14th Amendment, among other parts of the Constitution.

[5] *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936).

[6] *NFIB*, 132 S.Ct. at 2577.

these cases, the Court has held that the enumeration of distinct federal powers places affirmative limits on Congress's power. Some matters – those not within the bounds of the enumerated powers – are simply beyond the reach of federal hands. The second centers on protecting state sovereignty. The focus in these cases is the extent to which residual state sovereignty immunizes states from federal efforts to direct or otherwise influence state resources and policy decisions. Together, these two jurisprudential strains limit both *what* Congress may do and *how* Congress may do it.

Commerce Power

Article I, Section 8 of the Constitution grants Congress the power "to regulate Commerce . . . among the several states." As explained by Chief Justice John Marshall, this clause—the Commerce Clause—grants Congress "the power to regulate; that is, to prescribe the rule by which commerce is to be governed."[7] This, by its own terms, is a rather expansive power. Yet as broad as the commerce power may be, it is not without limits. In Marshall's words, there remains an "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."[8] Thus, as Chief Justice Roberts reminded us in *NFIB*, this power, like all federal powers, "must be read carefully to avoid creating a general federal authority akin to the police power."[9]

Under current doctrine, the commerce power (as supplemented by the necessary and proper clause) enables Congress to reach nearly all manner of economic activity. Specifically, under *United States v. Lopez*, the Constitution grants Congress the power to regulate in three areas: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities that "substantially affect" interstate commerce.[10] The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow. Thus, for example, Congress may regulate or prohibit the sale of driver's license information and other personal data collected by public and private entities because such information is a product sold in interstate commerce.[11] The contours of the "substantial effects" test, on the other hand, are less obvious.

As described and applied in *Lopez* and subsequent cases, the "substantial effects" test is more qualitative than quantitative. It is more concerned with the nature of the regulated activity or the regulatory scheme in question than with the aggregate economic impact of the regulated activity alone, or in combination with other similarly regulated activities. The key question is whether the activity subject to federal regulation is itself related to "'commerce' or any

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[7] Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196 (1824).

[8] *Id.* at 203.

[9] *NFIB*, 132 S.Ct. at 2578.

[10] *Lopez*, 514 U.S. 549, 558-59 (1995).

[11] *See* Reno v. Condon, 528 U.S. 118 (2000) (upholding the Driver's Privacy Protection Act as a proper exercise of Congress's Commerce Clause power).

sort of economic enterprise" or whether the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[12] Thus, Congress may regulate activities that are "economic in nature,"[13] such as industrial mining[14] or loan-sharking.[15] At the same time, Congress may reach relatively minor intrastate activities through broad economic regulatory schemes, such as a price maintenance regime for agricultural products or a comprehensive regulatory scheme governing the production, sale, and use of narcotics.[16]

That a given activity (or inactivity) might have a substantial economic impact, even when aggregated with all other instances of like conduct, is insufficient. The Supreme Court has explicitly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[17] It has also concluded that the commerce power may not be used to compel activity, *ab initio*, so as to facilitate regulation.[18] In close cases, the Court has also interpreted statutes narrowly so as to avoid exceeding the bounds of federal power.

Spending Power

Article I, section 8 of the Constitution also empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States." The spending power is not merely the power to appropriate federal money for federal purposes. As interpreted by the courts, it is also the power to induce private or state action by attaching conditions to the expenditure of federal money. As the Court noted in *Fullilove v. Klutznick*,[19] the clause empowers Congress to impose conditions on the use of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[20]

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[12] *Lopez*, 514 U.S. at 561.

[13] *See Morrison*, 529 U.S. at 608.

[14] *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[15] *See* Perez v. United States, 402 U.S. 146 (1971).

[16] *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding application of agricultural production quotas to production for a farmer's own use because allowing such production would undermine the national price control scheme created by the Agricultural Adjustment Act of 1938); Gonzales v. Raich, 545 U.S. 1 (2005) (upholding application of the Controlled Substances Act to the intrastate possession and use of marijuana).

[17] *Morrison*, 529 U.S. 598, 617 (2000).

[18] *See NFIB*, 132 S.Ct.

[19] 448 U.S. 448 (1980).

[20] *Id.* at 474.

The spending power is unquestionably broad, but it is not unlimited. In 1987, in *South Dakota v. Dole*,[21] the Supreme Court identified five restraints upon Congress's use of conditional federal spending. First, the appropriation of funds must be for the "general welfare" and not for a narrow special interest.[22] In making this determination, however, courts are "to defer substantially to the judgment of Congress."[23] Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.[24] In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. Third, any conditions imposed upon the receipt of federal funds must be clear and unambiguous.[25] Recipients of federal funds must have notice of any conditions with which they must comply, and the scope of their obligation. As the Court noted in 1981, "the legitimacy of Congress's power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[26] Fourth, and most significant, the conditions themselves must be related to the federal interest that the exercise of the spending power is itself supposed to advance. In the Court's words, "the condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended."[27] As reaffirmed in *New York*, the "conditions must . . . bear some relationship to the purpose of the federal spending, otherwise, of course the spending power could render academic the Constitution's other grants and limits of federal authority."[28]

Dole also suggested a fifth limitation on the use of conditional spending: "coercion." Specifically, the Court noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[29] This point has been reiterated in subsequent cases.[30] While not explaining what amount or degree of financial inducement would be necessary for an exercise of the spending power to become coercive, the *Dole* majority noted that here Congress only conditioned "a relatively small percentage of certain federal highway funds"[31]–specifically five percent of the funds from specific highway grant programs. Such an imposition

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[21] United States v. Dole, 483 U.S. 203 (1987).

[22] *Id.* at 207.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[27] *Dole*, 483 U.S. at 208.

[28] *New York*, 505 U.S. at 167 (citations omitted).

[29] *Dole*, 483 U.S. at 211.

[30] *See, e.g.*, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) (noting that, in some instances, "the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (quotation omitted)). *See also New York*, 505 U.S. at 167 (noting limits of federal spending power).

[31] *Dole*, 483 U.S. at 211.

represents "relatively mild encouragement to the States," thereby leaving states with the ultimate decision as to whether to conform to federal dictates, and is therefore not coercive.[32]

In striking down the conditions imposed on the Medicaid expansion, the Supreme Court reaffirmed the five requirements of conditional spending outlined in *Dole* and reiterated that "Spending Clause legislation is much in the nature of a *contract*."[33] The conditions paced on the Medicaid expansion easily satisfy most of the *Dole* requirements, however. The spending is for the "general welfare," as this has long been understood, and did not require states to engage in unconstitutional conduct as a condition of receiving the funds. The conditions placed on the spending were also clearly related to the purpose of the spending: increasing the availability of health care services to those in need.

Where the Medicaid expansion ran into trouble was that it arguably represented a fundamental change in the nature of the "contract" between states and the federal government. The Medicaid expansion was, in the Court's eyes, "a shift in kind, not merely degree."[34] Further, the sheer amount of money at stake made this effort to leverage state reliance unduly coercive. As Chief Justice Roberts explained, the federal government was doing far more than conditioning the receipt of new funds on state willingness to comply with conditions on how those funds would be used or related matters. Rather, Congress was leveraging state reliance on prior funding to induce states to participate in a new program. There was no purpose for the condition other than to induce compliance. As Chief Justice Roberts explained, when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[35] While recognizing that the spending power is broad, the Chief Justice also recognized that it was not unlimited – indeed, that it could not be unlimited without undoing the anticommandeering principle and other previously recognized limits on federal power.

While the Court struck down the conditions placed on the Medicaid expansion as going too far, it did not identify the precise point at which constitutionally permissible "pressure" becomes unconstitutional "coercion." Chief Justice Roberts was explicit on this point, noting the Court had "no need to fix a line" in this case.[36] It was sufficient to note that "wherever that line may be, this statute is surely beyond it."[37] In this manner the Court reaffirmed the need for a limit on the federal government's spending power, even if it could not identify precisely where that limit was.

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[32] *Id.*

[33] *NFIB*, 132 S.Ct. at 2602 (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002) (internal citation omitted).

[34] *Id.* at 2605.

[35] *Id.* at 2604.

[36] *Id.* at 2606.

[37] *Id.*

State Sovereignty

The enumeration of Congress's delegated powers is not the only limit on the scope of federal power. There are constitutional limits on the exercise of federal power, both explicit (as in the Bill of Rights) and implicit (as in those found in the Constitution's history and structure). The Supreme Court has found within the Constitution significant structural limits on the exercise of federal power that arise from the residual "sovereign" status of state governments. Building on the concept of "dual sovereignty" the Court has invalidated federal actions that impede upon, or affront the "dignity" of, states qua states.[38] In particular, the Court has held that the federal government may neither command states to participate in or implement a federal regulatory program,[39] nor may the federal government abrogate state sovereign immunity from suits for money damages save in limited circumstances.[40] These doctrines are not derived from the Constitution's text, but rather from structural considerations and unspoken assumptions in the document. They are nonetheless key components of the contemporary Court's federalism jurisprudence.

Of the structural limitations on federal power, the "anti-commandeering" principle is of the greatest potential importance for federal environmental law. Under this doctrine, "the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs."[41] As the Court declared in *New York v. United States*, "while Congress has substantial power under the Constitution to encourage States" to enact federally desired measures, "the Constitution does not confer upon Congress the ability simply to *compel* the States to do so."[42] Indeed, the Court in *New York* explained, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[43] To hold otherwise, the Court noted, would be to reject the idea that the states themselves retain substantial sovereignty within the federal system. It would also undermine accountability within the federal system.

The Court's holding in *New York* laid out simple ground rules for federal efforts to enlist State assistance in regulatory programs: "The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States" to adopt Congress's policy prescriptions.[44] In simple terms: "Whatever the outer

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[38] Alden v. Maine, 527 U.S. 706, 749 (1999).

[39] Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

[40] *See, e.g.*, *Alden*, 527 U.S. 706 (1999).

[41] *Printz*, 521 U.S. at 925.

[42] *New York*, 505 U.S. 144, 149 (1992) (emphasis added).

[43] *Id.* at 162.

[44] *Id.* at 188.

limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[45]

This limitation applies equally to efforts to commandeer a state or local government executive as a state legislature.[46] Congress is no more able to direct the activities of local law enforcement than it is a state senate. To hold otherwise would enable Congress to sidestep *New York* by directly ordering state officials to implement federal measures, bypassing the state legislature in the process.[47] Such federal power to direct state executive officials would infringe upon state legislatures' ability to control state policy. For this reason, the Supreme Court in *Printz v. United States* invalidated portions of a federal statute directing state law enforcement officials to perform background checks for handgun purchases. That the background-check requirement was arguably little more than a ministerial obligation, and did not impose a substantial burden on the local law enforcement officers, was deemed immaterial. [48]

Where Congress is unwilling to instruct the federal executive to regulate directly, it may seek to induce voluntary state participation in a federal scheme.[49] The most obvious means of accomplishing this is to offer funds to the states with conditions attached, or to threaten to cut off an existing funding stream if specified conditions are not met.[50] Such encouragement has significant force, but it also has constitutional limits. Indeed, the structural constraints on federal power imposed by *New York* and *Printz* imply such limits on the use of federal funds. While *New York* and *Printz* did not impose substantive restraints upon Congress's power, they did place structural impediments to the enactment of laws that would excessively intrude into the States' sovereign realms, and thereby threaten individual liberty.

Federalism Constraints on Environmental Regulation

Federal environmental regulation arguably represents the most expansive assertion of federal authority. Even where federal environmental programs are cooperative in nature, environmental regulation calls upon the federal government to affect, influence, and regulate a wider range of behavior – economic and otherwise – than any other area of federal concern.

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[45] *Id.*

[46] Printz v. United States, 521 U.S. 898 (1997).

[47] *Id.* at 929-30.

[48] *Id.* at 935 ("[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

[49] The court noted that there are "a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." *New York*, 505 U.S. at 167.

[50] *Id.* at 167 ("[U]nder Congress's spending power 'Congress may attach conditions on the receipt of federal funds.'" (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

Only federal environmental regulation, for example, could purport to regulate local activities ranging from home construction to recreational behavior on private land.[51]

Despite the ambitious sweep of federal environmental legislation, there was little, if any, thought given to the constitutional justification for such enactments.[52] Congress adopted environmental statutes governing a wide range of activities and phenomena never-before subject to federal regulation without questioning whether any such legislation might exceed the scope of Congress's enumerated powers. Nearly all the major environmental statutes give a passing nod to the historic state role in addressing pollution concerns, yet then proceed to expand the federal government's reach into such terrain.[53]

Congress retains substantial Commerce Clause authority to regulate economic activities and their environmental impacts. Recent precedents do not undermine federal statutes that explicitly regulate commercial or industrial activity as such. There is some question, however, about the extent to which Congress may use its Commerce Clause authority to regulate local land-use or reach non-economic activity. As the Supreme Court noted in *FERC v. Mississippi*, "regulation of land use is perhaps the quintessential state activity."[54] It will not be subsumed by federal legislation lightly.

While the logic of the Court's federalism decisions suggests limitations on Congress's ability to authorize the regulation of non-economic activity and the environmental impacts of such activity, lower courts have not been eager to enforce such limits. Indeed, lower federal appellate courts have uniformly rejected Commerce Clause challenges to the scope of federal environmental regulation. Constitutional challenges to the application of the Clean Air Act,[55]

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[51] *See, e.g.*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (U.S. Army Corps of Engineers' assertion of authority to regulate "walking, bicycling or driving a vehicle through a wetland" because such activities could result in the "discharge of dredged material").

[52] Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 147 (2001) ("As the number of statutes approach the century mark, little thought has been given by Congress to the constitutional basis of the legislation."); *id.* at 148 ("[W]hen the statutes were adopted, the underlying assumption was that the Commerce Clause grants virtually carte blanche authority to legislative for environmental protection."); Philip Soper, *The Constitutional Framework*, *in* FEDERAL ENVIRONMENTAL LAW 20, 24 (1974) (observing that applying contemporary Commerce Clause jurisprudence "to the environmental context results in a picture of congressional power that appears practically unbounded at least as far as concerns control over the typical areas of pollution"). *But see id.* at 21-22 (citing commentators who argued, in the 1960s, that some environmental concerns may lie beyond the scope of federal power).

[53] *See e.g.*, Federal Water Pollution Control Act (Clean Water Act), 26 U.S.C. § 1251(b) (2002) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibility of States...."); Clean Air Act, 42 U.S.C. § 7402(a) (2002) ("The Administrator shall encourage cooperative activities by the States and local governments ... and encourage the making of agreements between States for the prevention and control of air pollution."); Endangered Species Act, 16 U.S.C. § 1531(c)(2) (2002) ("It is further declared to be the policy of Congress that federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.").

[54] 456 U.S. 742, 768 n.30 (1982).

[55] *See* Allied Local and Reg' Mfrs. Caucus v. EPA, 215 F.3d 61 (D.C. Cir. 2000).

Clean Water Act,[56] Endangered Species Act,[57] and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[58] to intrastate activities have all failed thus far. In many of these cases, federal regulatory authority was upheld because the statute or regulations in question regulated explicitly industrial or commercial activity. For the most part, the result in district courts has been the same, upholding federal environmental statutes and regulations in the face of Commerce Clause challenges.[59] This phenomenon is not isolated to environmental law. Federal courts, generally, were reluctant to apply *Lopez* and *Morrison* so as to curtail the reach of federal Commerce Clause authority.

Despite this pattern, it seems likely that some environmental statutes exceed the scope of the Commerce Clause power delineated in *Lopez* and *Morrison*. Most vulnerable are the Endangered Species Act (ESA) and portions of the Clean Water Act (CWA). Neither the ESA nor the CWA explicitly regulates commercial activities, as such. Under the ESA, any and all activities that harm endangered species, including modest habitat modification, are potentially subject to federal regulation. Regulation under the CWA is confined to "navigable waters," which the federal government has defined to include all waters and wetlands irrespective of their navigability or relationship to interstate commerce. In each case, the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause.

While there is no doubt that the conservation of endangered species is an important and popular public policy goal, the appellate decisions have had a difficult time identifying a coherent rationale for upholding the ESA's take prohibition as against Commerce Clause challenge. As noted by then-Judge Roberts in *Rancho Viejo v. Norton*, the rationales set forth by the various courts, while appealing, are inconsistent with each other and appear to be inconsistent with analytical approach adopted by the Supreme Court.[60]

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[56] *See, e.g.*, United States v. Deaton, 332 F.3d 698 (4th Cir. 2003).

[57] *See* Rancho Viejo v. Norton, 323 F.3d 1062, 1065 (D.C. Cir. 2003); GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

[58] *See* Freier v. Westinghouse Elec. Corp., 303 F.3d 176 (2nd Cir. 2002); United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

[59] *See, e.g.*, FD&P Enter., Inc. v. United States, 239 F. Supp. 2d 509 (D.N.J. 2003) (upholding federal wetland regulations); United States v. Domenic Lombardi Realty, 204 F. Supp. 2d 318 (D.R.I. 2002) (upholding CERCLA); United States v. Red Frame Parasail, 160 F. Supp. 2d 1048 (D. Az. 2001) (upholding Airborne Hunting Act); United States v. Glidden, 3 F. Supp. 2d 823 (N.D. Ohio 1997) (upholding CERCLA); United States v. NL Industries, 936 F. Supp. 545 (S.D. Ill. 1996) (upholding CERCLA); Nova Chemicals, Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996) (upholding CERCLA). *But see* United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (invalidating CERCLA for *inter alia* exceeding the scope of Congress' commerce clause power), *rev'd* 107 F.3d 1506 (11th Cir. 1997).

[60] *See* Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) (noting the panel's approach "seems inconsistent with the Supreme Court's holdings" in *Lopez* and *Morrison*, and "conflicts with the opinion of a sister circuit").

In the context of wetland regulation, the Supreme Court has twice cautioned the Environmental Protection Agency and U.S. Army Corps of Engineers that their assertion of broad regulatory authority under the CWA may exceed the scope of the federal government's authority. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*[61] and *Rapanos v. United States*, the Court adopted a narrowing construction of the CWA out of a concern that a broad interpretation of the CWA would "push the limit of congressional authority" under the Commerce Clause.[62] In both cases, the Court limited the scope of the CWA to those wetlands and waters that have a "significant nexus" to truly navigable waters. Insofar as the EPA and Army Corps seek to extend CW authority beyond such waters or wetlands, they may be exceeding the scope of the federal government's constitutional authority.

The constitutional prohibition on commandeering limits the federal government's ability to make states cooperate in the enforcement and implementation of federal environmental laws. The doctrine here is clear and explicit. As a consequence, most federal environmental statutes adopt a "cooperative federalism" model under which the federal government seeks to induce state cooperation by providing a series of incentives. Under most such statutes, the federal government gives states the option of taking the lead in implementing the federal regulatory program within the state and may offer some degree of financial assistance. Should a state fail to accept this offer, however, the federal government will regulate in place of the state. The use of financial incentives and conditional federal regulation has been expressly approved by the Supreme Court in numerous cases, but the Court has also cautioned against the creation of incentives that could become coercive. Encouragement is permissible; coercion is not.

The constitutional prohibition on commandeering is one reason the Supreme Court has insisted that the power to place conditions on the receipt of federal spending is limited. The Supreme Court made this abundantly clear in *NFIB v. Sebelius* when seven justices voted to strike down Congress's effort to condition the receipt of all Medicaid funding on state willingness to expand the Medicaid program. This decision means that Congress must be careful not to place too much pressure on states to cooperate, such as by conditioning receipt of substantial federal funds for one program on state willingness to implement another. The logic of the *NFIB* decision would also seem to preclude the use of other incentives, such as the threat of punitive regulation in non-cooperative states, that could cross the line from inducement to coercion.

One statute that may be vulnerable to constitutional challenge after *NFIB* is the Clean Air Act. Specifically, insofar as the Act conditions state receipt of federal highway funds on Clean Air Act compliance, this may exceed the scope of federal power under *NFIB*. This is so for several reasons. First, the Clean Air Act conditions the receipt of money for one program (highway construction) on compliance with conditions tied to a separate program (air pollution control). This may be problematic because a majority of the Court thought

[61] 531 U.S. 159 (2001).

[62] *Id.* at 173.

Congress was trying to leverage state reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion). While the money at stake under the Clean Air Act is far less – most states receive substantially less in highway funds than in Medicaid funds – highway funding remains a substantial part of many state budgets and is less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.

It may also be relevant that highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund. For many states, federal highway funds represent the lion's share of their transportation budget. As a consequence, threatening to take highway funds may strike some courts as unduly coercive under *NFIB*. In the 1980s the Supreme Court upheld conditioning five percent of a state's highway funds on setting an 21-years-old drinking age. Under the Clean Air Act, however, a state can lose *all* highway funds, save those that will reduce emissions or are necessary for traffic safety, for failure to adopt a complete pollution control plan that satisfies the federal EPA.

The Court in *NFIB* also stressed that conditional grants of federal funds operate much like a contract, and that the parties are limited in their ability to unilaterally revise the terms. This could expose another vulnerability in the Clean Air Act because while the statutory requirements don't regularly change, what states must actually do to comply with the Clean Air Act's terms do. The requirements for state pollution control plans are constantly changing, as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to Clean Air Act regulation. Given the challenges that many states will face complying with current and proposed NAAQS standards, I would not be surprised should some states seek to challenge the EPA's authority to cut off federal highway funds or impose other sanctions on uncooperative states.

Limits on State Regulation

The primary constitutional limits on federal power derive from the delegation of limited and enumerated powers. The federal government only has those powers delegated to it. The states, on the other hand, have all those powers not delegated to the federal government or constrained by other constitutional provisions. Put another way, whereas the federal government's powers are limited and enumerated, the states possess a residual and plenary police power. Nonetheless, there are constitutional constraints on the sorts of environmental policies states may enact.

Supremacy Clause

The federal government's powers are limited, but they are also supreme. Article VI of the Constitution provides that the federal Constitution and "the Laws of the United States which shall be made in pursuance thereof" are "the supreme law of the land." Thus, where federal and state laws conflict, federal law prevails.

A consequence of the Supremacy Clause is that the federal government retains the authority to preempt state regulation of those matters within the reach of federal regulatory authority. Preemption may be express or implied.[63] Express preemption occurs when Congress enacts legislation that explicitly overrides or bars the application of state law.[64] Implied preemption, on the other hand, occurs when there is some degree of tension or incompatibility between federal and state law. This may occur when a federal statute covers an entire field of law so pervasively that there is no room for additional state or local regulation – so-called "field preemption"[65] – or when it is costly if not impossible for a regulated entity to comply with both federal law and state law simultaneously – so-called "conflict preemption."[66] Courts are generally reluctant to find preemption without either an express claim of preemption by Congress, or some other indication of implied preemption, such as a direct conflict between federal and state law.[67] Nonetheless, as a constitutional matter, there is no question that Congress retains the authority to use its enumerated powers to preempt or limit state laws that conflict with or are otherwise contrary to federal objectives.

Dormant Commerce Clause

Even when Congress fails to act, state laws will be held invalid if they impermissibly burden interstate commerce. The same Commerce Clause which authorizes Congress to regulate commerce "among the several states" has also been interpreted by the courts to constrain state regulation that unduly interferes with such commerce.[68] This "negative" aspect of the Commerce Clause – the so-called "Dormant Commerce Clause" – is "driven by a concern about 'economic protectionism –that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[69]

Under current doctrine, state laws that discriminate against out-of-state actors are subject to a form of strict scrutiny and are "virtually *per se* invalid."[70] States cannot discriminate against

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[63] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 96, 98 (1992) ("Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'") (citations omitted) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[64] *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

[65] *See* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

[66] *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002).

[67] *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 616 (1997) (Thomas, J., dissenting).

[68] *See, e.g.*, Dep't. of Revenue of Ky. v. Davis, 553 U.S. 328, 337 (2008) ("[A]lthough its terms do not expressly restrain 'the several states' in any way, we have sensed a negative implication in the provision since the early days.").

[69] *Id.* at 337-38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

[70] *See* Or. Waste Sys., Inc. v. Dep't. Envtl. Quality of Or., 511 U.S. 93, 99 (1994).

out-of-state actors or articles of commerce unless there is a "reason, apart from their origin, to treat them differently."[71] A discriminatory state law, such as a law that imposes higher taxes or regulatory burdens on goods produced out-of-state, will only be upheld if the state can show that the challenged provisions "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[72] As the Court has explained, a state may not adopt a discriminatory state law "if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available."[73] Current Dormant Commerce Clause doctrine is also particularly suspicious of extraterritorial legislation, understood as laws that attempt to "control conduct beyond the boundary of a state."[74]

Non-discriminatory state laws may be invalidated under the Dormant Commerce Clause as well. Under the *Pike* test, named for *Pike v. Bruce Church, Inc.*, it is unconstitutional for a state to enact a law that imposes a burden on interstate commerce that is "excessive in relation to the putative local benefits."[75] This, for instance, the Supreme Court has invalidated state laws that unnecessarily burdened commerce through the state, such as state laws requiring trucks on state highways to be shorter than those allowed in neighboring states[76] or requiring a specific type of mudguard.[77] Both the prohibition of discrimination and the *Pike* test operate as default rules that may be altered by Congress through the exercise of its power to regulate commerce.[78]

In recognition of the distinction between "States as market participants and States as market regulators," the Court has created a "market-participant" exception to the Dormant Commerce Clause.[79] Under this exception, state entities are permitted to participate in markets, buying and selling goods and services or providing public goods, in a discriminatory fashion.[80] As the Court has explained, "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others."[81] So, for instance, a state agency may adopt

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[71] City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978).

[72] *Or. Waste Sys.*, 511 U.S. at 101.

[73] Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

[74] *See* Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989).

[75] *See* 397 U.S. 137, 142 (1970).

[76] *See* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981). *See also* So. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (invalidating a state limit on train length within the state).

[77] *See* Bibb v. Navajo Trucking Freight Lines, 359 U.S 520 (1959).

[78] *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (rejecting, as against a dormant Commerce Clause challenge, discriminatory state insurance regulations authorized by the McCarran-Ferguson Act).

[79] *See* Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980); *see also* Hughes v. Alexandra Scrap Corp., 426 U.S. 794 (1976).

[80] *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007).

[81] *Hughes*, 426 U.S. at 810 (footnote omitted).

purchasing policies that favor in-state businesses or provide services on preferential terms to in-state residents.

Environmental laws do not get a pass from the Dormant Commerce Clause. The bar on discriminatory legislation applies unless and until such state measures are authorized by Congress. The Supreme Court has been quite explicit on this point. In *City of Philadelphia v. New Jersey*, in which the Garden State sought to defend a prohibition on the import of out-of state waste, the Court stressed that "all objects of interstate trade merit Commerce Clause protection."[82] Sound environmental intentions are not enough to insulate state laws from challenge. "Even if environmental preservation were the central purpose" of a challenged state law, the Court has explained, "that would not be sufficient to uphold a discriminatory regulation."[83]

Many state measures enacted to address concerns about climate change face Dormant Commerce Clause scrutiny Legal challenges to some such laws are pending, and it is likely that some state climate measures, particularly those that discriminate against out-of-state energy producers or obstruct the follow of interstate commerce, will be struck down. Under the Dormant Commerce Clause states retain ample ability to enact environmental regulations and otherwise control the environmental effects of energy use and production within their borders. Where states potentially run into trouble is where they seek to insulate themselves from the potential competitive effects of enacting potentially costly regulations or extend the reach of their regulatory choices to those in other jurisdictions.

One cautionary note is in order. For much of the past two centuries the Dormant Commerce Clause has been a powerful check on state regulations that threaten to burden or constrain interstate commerce. The Court was particularly aggressive in its enforcement of the Commerce Clause's "negative" aspects during the Burger and early Rehnquist Courts. In recent years, however, some Justices on the Supreme Court have expressed reservations about current Dormant Commerce Clause doctrine, and the Court has taken a permissive view of state legislation designed to "protect governmental operations from out-of-state competition."[84] Both Justices Thomas and Scalia and have expressed concern about the use of an atextual doctrine to invalidate state laws.[85] Concluding the doctrine "has no basis in the Constitution and has proved unworkable in practice," Justice Thomas would "discard" it entirely.[86] Justice Scalia, on the other hand, adopts a more moderate view, agreeing to apply

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[82] 437 U.S. 617, 622 (1978).

[83] W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 204 (1994).

[84] *See* Norman R. WIlliams & Brannon P. Denning, *The New Protectionism and the American Common Market*, 85 NOTRE DAME L. REV. 247, 250 (2009).

[85] *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209 (1994) (Scalia, J., concurring). *United Haulers,* 550 U.S. at 349 (Thomas, J., concurring in the judgment).

[86] *United Haulers,* 550 U.S. at 349 (Thomas, J., concurring in the judgment).

the doctrine "only when *stare decisis* compels" him to do so.[87] If these views prevail, the Dormant Commerce Clause may recede in importance.

Improving Environmental Protection

As I noted at the outset, the Constitution does limit some of the things that the federal and state governments may do to address environmental concerns, but this need not come at the expense of environmental protection. To the contrary, in seeking to align federal environmental laws with the constitution's structure, there is an opportunity to enhance environmental protection by ensuring a more rational allocation of authority between the federal and state governments.

There are many reasons to believe that environmental protections would be more successful, and environmental programs would be more cost-effective, were responsibility divided between the federal and state governments in a more justifiable manner. Ideally, the federal government should reorient its efforts toward those areas in which the federal government possesses an institutional advantage, due to economies of scale (as with scientific research), or where state and local governments are incapable of addressing environmental problems, such as where there are substantial interstate spillovers. Ensuring a greater "match" between the scope of environmental problems and the institutions entrusted with addressing such concerns would enhance the efficiency, effectiveness, and equity of existing environmental protection efforts.[88]

Seeking to expand federal environmental regulations to the outermost limits of federal regulatory authority is not a recipe for effective environmental policies. The federal government, like all governments, has limited resources. Congress only appropriates so much money to federal regulatory agencies and there is only so much time federal regulators may devote to any given concern. In addition, there are inherent limits to what central regulatory agencies are able to accomplish due to information and other constraints. These realities strongly counsel focusing federal efforts on those environmental concerns that have a distinctively federal character and in those areas where states are particularly unlikely or unable to address environmental problems, such as when activities in one state spill over into another. Authorizing – or, worse, mandating – the federal government to oversee and regulate all manner of localized environmental concerns is wasteful and inefficient – and sacrifices opportunities for meaningful environmental gains.

Short of rewriting existing environmental statutes, one way of providing greater state flexibility and freeing the federal government to focus on truly national concerns would be to create a formal mechanism whereby states could opt out of some federal regulatory requirements. Elsewhere I have proposed a policy of "ecological forbearance," under which states could petition federal agencies for waivers from federal requirements where there are

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[87] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part).

[88] *See generally*, Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVTL. L. J. 130 (2005).

no compelling reasons to enforce the federal rule.[89] Such a policy would enable states to experiment with alternative means of environmental protection, thereby reopening the laboratories of democracy in environmental policy. It also would have the potential to free up federal resources to focus on those areas in which interstate spillovers or economies of scale require greater federal involvement.

Despite the environmental successes of the past three decades, the overlapping and contradictory state and federal rules do not lead to efficient or effective environmental protection. It is in some senses an historical accident that state leadership in environmental policy was supplanted by federal regulation, and environmental policy could be improved if states regained more of their historic role. The federal government did not come to dominate environmental policy because a more decentralized system was leading to environmental ruin, and much of the what the federal government does in environmental policy could be left to the states. Thus constitutional constraints on federal power in environmental policy is nothing to fear. Indeed, environmental protection could be improved if federal dominance was confined to those areas in which the federal government has something unique to contribute.

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Thank you again for the opportunity to present my views on this important subject, Mr. Chairman. I hope that my perspective has been helpful to you, and will seek to answer any additional questions you might have.

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[89] *See* Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation, in* THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW (J. Chen ed., 2004).

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Mr. SHIMKUS. Thank you.

And the Chair now recognizes Mr. Revesz for 5 minutes.

STATEMENT OF RICHARD REVESZ

Mr. REVESZ. Thank you, Mr. Chairman and members of the subcommittee. I am Richard Revesz from the New York University School of Law. I also serve as the director of the American Law Institute.

I have written extensively in the area of federalism and environmental regulation, mostly in the matter of the policy domain, when should Congress act when it has the power to do so. I have not written as extensively in the constitutional domain but generally share the views of Mr. Meltz that the constitutional limits, while they definitely exist, leave a great scope of—a great domain for action from Congress. So many of the important questions are questions of when Congress should decide to exercise that authority, rather than does Congress actually have that authority.

Mr. SHIMKUS. Excuse me. Could you make sure your mike is on and that it is pulled close to you?

Mr. REVESZ. I am sorry.

Mr. SHIMKUS. That is OK. We have some old guys up here, and I could hear you fine, but——

Mr. REVESZ. I will focus on three matters in this testimony.

First, the presence of interstate externalities provides the most compelling argument for Federal regulation. A State that sends pollution to another State obtains the labor and fiscal benefits of the economic activity that generates that pollution but does not suffer the full cost of the activity because the adverse health and environmental consequences are suffered by other States. As a result, a suboptimally large amount of pollution crosses State lines.

But the fact that some form of Federal regulation is necessary to properly control interstate externalities does not mean that any type of Federal regulation is well-suited for the task. The Clean Air Act provides a compelling example of this problem. Even though it has been in effect since 1970, we still have not properly succeeded at controlling interstate pollution.

Let me give you two bookends. The first significant litigated case in this area was Air Pollution Control District of Jefferson County v. EPA and was decided by the Court of Appeals for the Sixth Circuit in 1984. Interestingly, at that time, Mitch McConnell, the current Senate minority leader, was the judge/executive for Jefferson County, Kentucky, which brought this action to try to compel Indiana to reduce its interstate externalities.

Kentucky actually controlled its local power plant very stringently, and that power plant had at the time spent $138 million in pollution control, which would be more than $300 million in today's dollars. But Jefferson County, despite having done that, was not able to obtain the benefits of the regulation because prevailing winds from Indiana deposited in Jefferson County pollution from an Indiana plant that was essentially uncontrolled. The Kentucky plant emitted 1.2 pounds of sulphur dioxide per million BTU of heat input, and the Indiana plant emitted 6 pounds—five times as much.

Jefferson County was actually unsuccessful in that case in its effort to compel the U.S. Environmental Protection Agency to order the reduction in the Indiana emissions. And, in fact, it wasn't until more than 30 years later, until this past April, when the U.S. Supreme Court, in EPA v. EME Homer City Generation, held that under the good-neighbor provision of the Clean Air Act the pollution control burden to upwind and downwind States could be allocated in a way that minimized the overall cost of meeting the Federal ambient standards.

This cost-minimization formula strikes me as eminently rational, and the court decided this on a six-two vote. If this rule had been in effect in 1984, then-Judge/Executive Mitch McConnell's citizens would have gotten the Federal redress that they had sought and that they actually deserved.

My second point: The issue of interstate externalities is now being raised by a more recent environmental problem arising from hydraulic fracturing, or fracking, which is a technique used to extract oil and natural gas from shale.

Some of the environmental ills from fracking, such as increased seismic activity and groundwater contamination, are localized. But at least one significant consequence of fracking, the emission of fugitive methane, can wreak harm far from the wellhead. Fugitive methane's interstate and, indeed, international impacts make it particularly well-suited for Federal regulation.

Methane, as you know, is a potent greenhouse gas with an estimated global-warming potential 21 to 25 times greater than that of carbon dioxide. Natural gas itself is composed of more than 80 percent methane, and, during the production and distribution processes, some portion of methane leaks or is vented into the atmosphere. While fugitive methane emissions can result from all drilling techniques, some studies suggest that fracking is associated with significantly higher leakage rates.

Like carbon dioxide, methane emissions become well mixed in the upper atmosphere, making their harmful effects global rather than local.

The U.S. Environmental Protection Agency recently began the process of regulating greenhouse gas emissions associated with the ultimate combustion of natural gas by proposing performance standards for new and existing power plants. Those standards, however, will do nothing to reduce pollution emitted at earlier stages in the gas' life cycle, including extraction, processing, storage, and delivery. Such upstream emissions can be quite significant, accounting for 20 to 30 percent of the natural gas life cycle emissions.

My last point refers to a related question: When, if ever, should the Federal Government preempt more stringent State standards?

So the most compelling argument for doing that is in the case of product standards where there are products that exhibit significant economies of scale in production. If these products were subjected to inconsistent State standards, those economies of scale would be lost.

And the most compelling example of this case are automobiles. And, in fact, for the most part, we do have uniform auto standards. In fact, we have two in the country; we have the Federal stand-

ards, and we have the California standards, and States can opt for one or the other but can't choose anything in between.

There are other products that exhibit significant economies of scale in production, but not all products do. And where products don't exhibit those economies of scale, the argument for Federal preemption of more stringent State standards is much weaker.

The argument for Federal preemption of more stringent State standards is even weaker in the case of——

Mr. SHIMKUS. We are going to have to get you to wrap up.

Mr. REVESZ. Yes, I——

Mr. SHIMKUS. I know you are very close.

Mr. REVESZ. I am done, basically.

In the case of process standards, because inconsistent process standards do not impede the proper trading of products in a national market.

And, with that, my summary is done, and I am happy to at some point take your questions.

[The prepared statement of Mr. Revesz follows:]

Testimony of Richard Revesz
Lawrence King Professor of Law and Dean Emeritus
New York University School of Law
Before the Subcommittee on Environment and the Economy
House Committee on Energy and Commerce
July 11, 2014

Introduction

Good morning and thank you for inviting me to testify before this subcommittee. I am Richard Revesz, the Lawrence King Professor of Law and Dean Emeritus at New York University School of Law School. At NYU Law School, I also serve as the Director of the Institute for Policy Integrity, a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. In addition, I am the Director of the American Law Institute, the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The views I will express today are my own and do not represent the views, if any, of New York University or the American Law Institute.

I have written extensively in the area of federalism and environmental regulation. The bulk of my work on this topic is contained in three articles and then summarized in a number of book chapters and symposium pieces. The first of these articles, "Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation," published in the *NYU Law Review*, received the award for the best article or book on administrative law and regulatory

practice that appeared in 1993, given by the American Bar Association's Section on Administrative Law and Regulatory Practice. The second article, "Federalism and Interstate Environmental Externalities," published in the *University of Pennsylvania Law Review*, was cited prominently this past April in the first paragraph of Justice Ginsburg's majority opinion in *Environmental Protection Agency v. E.M.E. Homer City Generation*, where the Court upheld, in a 6-2 decision, the U.S. Environmental Protection Agency's approach to allocating between upwind and downwind states the pollution control burden necessary to meet federal standards for ambient air quality. The third article, "Federalism and Environmental Regulation: A Public Choice Analysis," was published in the *Harvard Law Review*. Each of these three articles was recognized by the *Land Use & Environment Law Review* as one of the best articles in environmental law published in its respective year. Copies of the articles are attached.

My academic work, as well as my testimony before this subcommittee, focuses on one of the issues on the agenda for today's hearing: as a matter of policy, when is federal intervention desirable? Neither my academic work nor my testimony focuses on the constitutional limits on federal power. As you will hear from others on this panel, the constitutionally permissible scope of federal regulatory power is very broad. As a result, the most important questions concern when and how that power should be exercised.

Summary

My testimony today focuses on three aspects of the policy question concerning when federal intervention is desirable. First, I argue that the presence of interstate externalities, which occur when pollution from one state has negative environmental consequences on other states or on the Nation as a whole, provides

the most compelling argument for federal environmental regulation. Unfortunately, actual federal regulation is often not well targeted to properly control the existing interstate externality. In this context, I will briefly discuss the federal government's experience regulating interstate air pollution under the Clean Air Act.

Second, I examine a current environmental controversy through the lens of interstate externalities: whether and how hydraulic fracturing, generally referred to as fracking, should be regulated. This debate would benefit from a clear distinction between environmental consequences that are local and ones that have interstate consequences. Fugitive methane emissions that escape into the atmosphere as a consequence of the extraction process are a paradigmatic example of an environmental problem requiring federal regulation.

Third, I discuss when it is appropriate for the federal government to preempt state standards that are more stringent than the corresponding federal standards. I show that federal preemption is desirable in the case of standards for products that exhibit strong economies of scale in production, but not for standards for other products, or for process standards, which determine how products can be produced.

Interstate Externalities and the Clean Air Act

As I already indicated, the presence of interstate externalities provides the most compelling argument for federal regulation. A state that sends pollution to another state obtains the labor and fiscal benefits of the economic activity that generates the pollution, but does not suffer the full costs of the activity because the adverse health and other environmental consequences are suffered by other states. Thus, a suboptimally large amount of pollution will cross state lines.

But the fact that some form of federal regulation is necessary to properly

control interstate externalities does not mean that *any* type of federal regulation is well suited to the task. The Clean Air Act provides a compelling example of this problem. Even though it has been in effect since 1970, we still have not succeeded a properly controlling interstate pollution. Let me give you two bookends. The first significant litigated case in this area, *Air Pollution Control District of Jefferson County, Kentucky v. Environmental Protection Agency*, was decided by the U.S. Court of Appeals for the Sixth Circuit in 1984. At the time, Mitch McConnell, the current Senate minority leader, was the Judge-Executive for Jefferson County, Kentucky. Kentucky had chosen to impose strict limits on its pollution in order to protect the health of its citizens. The local power plant had spent $138 million in pollution control—more than $300 million in today's dollars. But Jefferson County was not able to obtain the full benefits of this regulation because prevailing winds from Indiana deposited in Jefferson County pollution from an Indiana power plant that was essentially uncontrolled. The Indiana plant emitted 6 pounds of sulfur dioxide per million BTU of heat input—5 times as much as the Kentucky plant.

Jefferson County sought to compel the U.S. Environmental Protection Agency to limit the emissions of the Indiana power plant. Unfortunately, the county lost the case and it took almost thirty more years, until this past April, for the law to be finally clarified and made more rational. As I already indicated, in *Environmental Protection Agency v. E.M.E. Homer City Generation*, the Supreme Court recently held that under the "good neighbor" provision of the Clean Air Act, the pollution control burden between upwind and downwind states could be allocated in a way that minimized the overall cost of meeting federal ambient standards. If this legal rule had been in effect in 1984, then Judge-Executive Mitch McConnell's citizens would have gotten the federal redress they sought.

Hydraulic Fracturing and the Regulation of Fugitive Methane

The issue of interstate externalities is now being raised by a more recent environmental problem arising from fracking techniques used to extract oil and natural gas from shale. Many of the resulting environmental ills, such as increased seismic activity and groundwater contamination, are localized. But at least one significant consequence of fracking, the emission of "fugitive" methane, can wreak harm far from the wellhead. Fugitive methane's interstate—and, indeed, international—impacts make it particularly well suited to federal regulation.

Methane is a potent greenhouse gas, with an estimated global warming potential value 21 to 25 times greater than that of carbon dioxide. Natural gas itself is composed of more than 80% methane, and during the production and distribution processes some portion of that methane leaks (or is vented) into the atmosphere. While fugitive emissions can result from all drilling techniques, some studies suggest that fracking is associated with significantly higher leakage rates.

Like carbon dioxide, methane emissions become "well mixed" in the upper atmosphere, making their harmful effects global rather than local. In other words, a ton of methane emitted in California has the same marginal impact on global climate change as a ton emitted in North Dakota. Because an individual state will suffer only a small fraction of the harm associated with its methane emissions, the state has a significant incentive to under-regulate methane-producing activities like fracking.

The U.S. Environmental Protection Agency (EPA) recently began the process of regulating greenhouse gas emissions associated with the ultimate *combustion* of natural gas by proposing performance standards for new and existing power plants. Those standards will do nothing, however, to reduce pollution emitted at earlier stages in the gas's "life cycle," including extraction, processing, storage, and delivery. And such "upstream" emissions can be quite significant, accounting for an estimated

20 to 30 percent of total natural gas life-cycle emissions. Accordingly, there should be additional performance standards to constrain greenhouse gas emissions from upstream sources like natural gas wells, pipelines, and storage tanks.

Upstream gas infrastructure is already subject to performance standards for the emission of volatile organic compounds and hazardous air pollutants. While those standards have the co-benefit of reducing methane emissions, directly regulating methane would generate significant additional reductions.

As for the appropriate stringency of upstream methane standards, EPA should regulate to the point where the marginal cost of abatement is equal to the social cost of methane—in other words, the point where the cost of preventing an additional unit of methane emission is equivalent to the cost that unit of emission imposes on society. At that stringency, energy companies will be incentivized to perform all abatement that is cost-benefit justified. In the short term, the agency can calculate the social cost of a unit of methane by converting it into units of carbon dioxide equivalent and applying the Interagency Working Group's estimate of the Social Cost of Carbon. In the longer term, however, the federal government should heed the advice of leading economists and separately model the full social cost of methane, which would more accurately account for the gas's shorter atmospheric life span, among other differences.

Preemption of More Stringent State Standards

I now turn to a related question: when, if ever, should the federal government preempt more stringent state standards. In general, the federal government should act when a pathology, such as the presence of interstate externalities, would lead some states to set suboptimally lax standards if left to their

own devices. But those standards should be viewed as minimum standards, allowing states to set more stringent limits if they wish to do so. The reason is that federal standards have a limited purpose: to constrain the undesirable under-regulation that might result from a particular pathology, such as the presence of interstate externalities. Significantly, the purpose of federal intervention in such cases is not to displace state autonomy altogether. A typical example is section 116 of the Clean Air Act, which explicitly preempts state standards that are less stringent than the federal standards, but generally leaves in place any more stringent state standards. Such an approach is generally appropriate because some states might have higher preferences for environmental protection, lower costs of regulation, or the presence of more abundant substitutes for the regulated product.

The federal environmental laws contain one very significant, appropriate exception to this model of federal standards that are floors but not ceilings. Emission standards for automobiles are nationally uniform, with the federal standard acting as both a floor and a ceiling. Actually, to be accurate, the federal regime allows California to set more stringent standards and allows other states to choose between the California standard and the federal standard. But states cannot choose any other standards, regardless of whether they are more or less stringent than the federal standards. A similar requirement for uniformity applies to the regulation of pesticides. What is special about cars and pesticides that makes these distinctions appropriate, as I believe they are? Both are goods exhibiting significant economies of scale in production. In such cases, disparate state regulation would break up the national market for the product and be costly in terms of foregone economies of scale.

But the benefits of uniformity on this account can easily be overstated. Most products do not have similarly strong economies of scale in production. In those

cases, there is no compelling federal justification for preempting state standards that reflect state preferences for safety that are higher than the aggregated national preferences reflected in the federal regime.

Moreover, the argument for federal preemption of more stringent state standards is particularly weak in the case of process standards. Process standards, such as emission standards for power plants, govern the environmental consequences of the manner in which goods are produced rather than the consequences of the products themselves. Indeed, unlike the case of dissimilar product standards, there can be a well-functioning national market for products regardless of the stringency of the process standards governing their manufacture. If states want to impose higher costs on their manufacturers in order to reap the resulting health and environmental benefits, there is no reason for the federal government to interfere with their autonomy.

Conclusion

I am very grateful to have been invited to testify today and will be delighted to answer any questions you might have.

Mr. SHIMKUS. Thank you, sir.

Now we will turn to Rena Steinzor, a professor from the University of Maryland.

Welcome back, and you are recognized for 5 minutes.

STATEMENT OF RENA STEINZOR

Ms. STEINZOR. Mr. Chairman, Ranking Member Tonko, and members of the subcommittee, I appreciate the opportunity to testify today on cooperative federalism, which is the term used to describe——

Mr. SHIMKUS. Can you check your mike also or pull it closer?

Ms. STEINZOR [continuing]. The constitutional and the political policy and legal relationship between the Federal and State Governments with respect to environmental policies and law.

As I understand the situation, the subcommittee's leadership called this hearing in part to explore the contradiction between the notion that legislation to reauthorize the Toxic Substances Control Act should preempt any State authority to regulate chemical products with the notion that the Federal Government shoulddepend on the States to regulate coal ash and has no role to play in protecting the public from such threats.

These positions are a dichotomy if there ever was one. The contradictory ideas that the Federal Government must dominate the field in one area but that State Government should be exclusively in control in another seems irreconcilable as a matter of principle.

Of course, as a practical matter, these irreconcilable positions have consistent pragmatic outcomes: They help big business. The chemical industry feels much more confident about its ability to browbeat the EPA into quiescence under the weak provisions of the TSCA legislation under discussion so long as proactive States like California are knocked out of the equation. The electric power industry is much happier submitting to State regulators, who, as the recent spill in North Carolina clearly illustrates, have done almost nothing to control the severe hazards of improper coal-ash disposal. Or, in other words, States should prevail as long as they aren't doing much to gore the ox of big business.

This debate has been going on in one iteration or another for decades. Congress has grappled with it. The Supreme Court has grappled with it. The States have participated in the debate, as has the executive branch. And out of all this intense debate have come two fundamental principles well-recognized by mainstream constitutional scholars:

One, the wide range of Federal programs dealing with health, safety, and the environment are grounded appropriately in the Commerce Clause. While the Supreme Court has imposed some limits on Federal authority, they do not apply to the structure of Federal environmental law.

Two, a coherent set of eminently reasonable principles defines the cooperative partnership that prevails in the health, safety, and environmental areas.

So what are those principles? As everyone has said, pollution does not stop at State lines, and, in many cases, strong Federal laws are the only way to control so-called transboundary pollution. My State, Maryland, suffers tremendously from transported pollu-

tion from Ohio. Coal-fired power plants is just one example. We actually send a plane up every time those emissions increase because the State agency is so anxious to demonstrate that it can't control this pollution.

But there are other principles. A second one is that uniform national standards crafted by the Nation's best and brightest technical experts are efficient, avoiding the need to reinvent the wheel 50 times.

A third and very important one is that all citizens should receive equal protection under the law. That is, everyone should be able to expect a minimal set of effective safeguards no matter what State they happen to live in.

Businesses should compete on a level playing field. If they operate in States that choose strong protections, they should not be undercut by businesses operating in States that choose weak protections. And States should avoid a race to the bottom in competing for new industry.

It is easy to write a law, as you know, and much harder to make sure it is implemented and enforced fairly and aggressively throughout our vast country. Governments at all levels struggle to be effective and efficient and must remain accountable to their citizens. In areas as important as protecting public health and the environment, everyone, no matter where they live, deserves equal protection. Making States responsible for delivering on this crucial goal is a key part of EPA's mission.

Thank you.

[The prepared statement of Ms. Steinzor follows:]

TESTIMONY

Rena Steinzor
Professor, University of Maryland Carey School of Law
and
President, Center for Progressive Reform (www.progressivereform.org)

before the

Committee on Energy and Commerce
Subcommittee on Environment and Economics
U.S. House of Representatives

Hearing on
Constitutional Considerations: States vs. Federal Environmental Policy Implementation

July 11, 2014

Mr. Chairman, ranking member Tonko, and members of the subcommittee, I appreciate the opportunity to testify today on "cooperative federalism," the term used to describe the constitutional—and the political, policy, and legal—relationship between the federal and state governments with respect to environmental policies and law.

I am a law professor at the University of Maryland Carey School of Law and the President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, CPR is a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. We have a small professional staff funded by foundations. I joined academia mid-career, after working for the Federal Trade Commission for seven years and the House Energy and Commerce Committee for five years. I was a lawyer for small, publicly-owned electric systems as a partner at Spiegel & McDiarmid, a mid-size law firm in Washington, D.C. I have served as a consultant to the Environmental Protection Agency (EPA) on environmental justice issues and have testified before Congress many times. My work on environmental regulation includes five books, and over thirty articles (as author or co-author). My most recent book, published by the University of Chicago Press, is *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*, co-authored with Professor Sidney Shapiro of Wake Forest University's School of Law, which comprehensively analyzes the state of the regulatory system that protects public health, worker and consumer safety, and natural resources, and concludes that these agencies are under-funded, lack adequate legal authority, and consistently are undermined by political pressure motivated by special interests in the private sector. This January, Cambridge University Press will publish my book entitled *Why Not Jail: Industrial Catastrophes, Corporate Malfeasance, and Government Inaction*. That book argues for more consistent and frequent enforcement of criminal laws at the federal and state levels when reckless behavior within corporations kill or injure workers or members of the public, or cause irreversible damage to the environment.

As I understand the situation, the Subcommittee's leadership called this hearing in part to explore the contradiction between the notion that legislation to reauthorize the Toxics Substances Control Act (TSCA) should preempt any state authority to regulate chemical products with the notion that the federal government should depend on the states to regulate coal ash and has no role to play in protecting the public from such threats. These positions are a dichotomy if there ever was one. The contradictory ideas that the federal government must dominate the field in one area but that the state government should be exclusively in control in another seems irreconcilable as a matter of principle.

Of course, as a practical matter, these irreconcilable positions have consistent pragmatic outcomes: they help big business. The chemical industry feels much more confident about its ability to browbeat the Environmental Protection Agency (EPA) into quiescence under the weak provisions of the TSCA legislation under discussion, so long as proactive states like California are knocked out of the equation. The electric power industry is much happier submitting to state regulators, who, as the recent spill in North Carolina clearly illustrates, have done almost nothing to control the severe hazards of improper coal ash disposal than it would be dealing with EPA's more stringent regulatory proposals. Or, in other words, states should prevail as long as they aren't doing much to gore the ox of big business. Once they get started down the road to regulate more stringently, however, the federal government must step in to halt a "patchwork" of overly aggressive regulation.

This debate has been going on, in one iteration or another, for decades. Congress has grappled with it, the Supreme Court has grappled with it, the states have participated in the debate, as has the Executive Branch, and out of all this intense debate have come two fundamental principles well-recognized by mainstream constitutional scholars:

> **One.** The wide range of federal programs dealing with health, safety, and the environment are grounded appropriately in the Commerce Clause. While the Supreme Court has imposed some limits on federal authority, they do not apply to the structure of the federal environmental law.
>
> **Two.** A coherent set of eminently reasonable principles defines the cooperative partnership that prevails in the health, safety, and environmental area, and I urge the subcommittee to return to these principles in allocating responsibility to federal and state governments.

Constitutional Support for Cooperative Federalism

Despite a lot of arm waving by the poorly informed advocates of deregulation regarding the limits imposed on federal government power under the Commerce Clause and the states' prerogatives under the Tenth Amendment, the very limited constraints imposed by the Supreme Court under these provisions have little relevance to the structure of U.S. environmental protection programs. All of these programs divide responsibility between EPA and the states, with EPA setting standards and the states implementing such standards through permits and enforcement. Participation by the states is voluntary: they apply for a "delegation" of authority from EPA to assume responsibility for a specific program, and receive in return that authority and, generally, some funding to support implementation. If a state chooses not to apply, EPA implements the program on its own. The vast majority of states have received delegations to

implement to vast majority of programs, however, for two reasons: first, the states recognize the value of the programs for their citizens and the natural resources within their borders and, second, they wish to operate as a full partner with EPA because they have strong incentives to reiterate their ability to govern.

Because they are proud, and because they are accustomed to a partnership that places them on an equal footing with EPA, states bitterly resent congressional efforts to preempt their authority. I have attached to this testimony a recent letter addressed to Chairman Shimkus and Ranking Member Tonko opposing the preemption provisions of pending TSCA reauthorization legislation.

I have dealt with these issues for close to four decades, and I would look quite foolish if I pretended that EPA's relationship with the states is nirvana. Like any marriage, cooperative federalism is very difficult to sustain, takes constant vigilance, and sometimes breaks down into recrimination and resentment. The states chafe at EPA's bossiness and EPA is irate at their shortcomings. But it has been, quite literally, decades since anyone suggested that this relationship was not firmly grounded in the Constitution and, specifically, the Commerce Clause.

The most relevant case is New York v. U.S., 505 U.S. 144 (1992), which dealt with efforts to compel the State of New York (and other states) to take title to low-level nuclear waste generated within their borders if they failed to either provide enough disposal capacity to cover such wastes or entered into "regional compacts" with other states to build such facilities. The Low-level Radioactive Waste Policy Amendments of 1985 offered three federal incentives for states to comply with these requirements: monetary awards, the ability to impose elevated charges on waste disposal from non-complying states, and the take title requirement. The Supreme Court approved the first two incentives as consistent with congressional authority under the Commerce Clause, but held that Congress did not have constitutional authority to "commandeer" state resources and legal authority through the take title provision. In the 22 years since, no one has suggested that any of the federal environmental programs run afoul of that restriction.

Principles for Dividing the Job

Almost all federal environmental laws divide the job of controlling pollution between the federal government and the states. Some laws, such as the Clean Air Act, require the federal government to set the standards that sources of pollution must meet and tell the states to find a way to meet the standards through the crafting of State Implementation Plans (SIPs). Under other statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act (dealing with hazardous waste disposal), the federal government sets requirements for polluters and then allows states the option of running the day-to-day regulatory programs that implement these requirements. In this system, for example, states write pollution permits and bring enforcement actions against violators.

The states are always free to adopt more stringent regulatory requirements if they wish to do so. But no state program can adopt less stringent requirements. In other words, these federal laws set a floor for safeguards, which states must at least meet but are free to exceed. If, in the course of running its pollution control program, a state falls significantly short of the benchmarks established by EPA, EPA can withdraw the state's authority to run the pollution program, and

instead run the program itself. (In bureaucratic parlance, this action is called the "withdrawal of EPA's delegation of authority.")

Congress embraced a strong federal role in pollution control because:

1. Uniform national standards crafted by the nation's "best and brightest" technical experts are efficient, avoiding the need to reinvent the wheel 50 times.
2. All citizens should receive equal protection under the law—that is, everyone should be able to expect a minimal set of effective safeguards no matter what state they happen to live in.
3. Businesses should compete on a level playing field, and by that I mean good actors should not be left at a competitive disadvantage relative to bad actors who do business in states that allow them to cut unacceptable corners on health, safety, and the environment.
4. States would avoid a "race to the bottom" in competing for new industries.
5. Pollution does not stop short at state lines and, in many places, strong federal laws are the only way to control so-called "transboundary pollution."

As I mentioned earlier, despite the clear need for a strong federal role in environmental protection, great tension is present in the world of cooperative federalism. Obviously, states differ in their approach to environmental protection. Some do an outstanding job on specific programs – better, even, than the federal EPA. Other states are dreadfully deficient. The result is that their citizens are exposed to far higher levels of harmful pollutants than the federal government deems safe. States try to attract business by offering to relax environmental protections. State environmental agencies are increasingly starved for resources, making it difficult or even impossible to carry out their federal statutory mandates. Some states lack not only resources but the political will to police local industries who threaten to move elsewhere if the regulatory climate is not "friendly" to business. EPA also suffers from limited resources and, on occasion, a failure of political will, and has withdrawn or threatened to withdraw state delegations on only a handful of occasions. Many states resent their federal partner, engaging in open rebellion against the "unfunded mandates" that are imposed on them by federal authorities. States and regulated industries also argue that "one-size-fits-all" regulation saps the economy. They bristle at tough national standards and fight to tailor regulations so they apply to "local conditions."

Equally as troubling, EPA has never made an effort to gather data or develop a template for the amount of resources states must commit to the implementation of federally-delegated programs. The Agency does not have reliable information about the size of state budgets for such programs, and passively accepts the fact that such budgets are most often a product of a wide range of factors (e.g., population, economic health, local politics) that have absolutely nothing to do with the regulatory burden (e.g., number of regulated facilities, scope and depth of pollution problems, presence of nationally treasured natural resources) the state must support. Without such information, EPA cannot explain to the states in a fair and clear way what they must do to hold up their end of the delegation bargain.

In short, cooperative federalism has hit two basic stumbling blocks. EPA and the states do not have sufficient resources to implement federal environmental requirements. We do not have basic information that would allow us to address problems with how the system is working.

Strong federal standard-setting and oversight is as important today as it was when Congress wrote cooperative federalism into pollution control statutes. The weakening of federal authority harms public health and weakens environmental protection. When the states fight unfunded mandates, they fail to acknowledge the fact that they would be responsible for protecting public health from the adverse effects of toxic pollutants; delivering clean drinking water; safeguarding precious natural resources; and curbing transboundary pollution whether or not the federal government played any role. By the same token, when Congress disrespects the states by imposing preemption, especially in an area as important as the testing and oversight of toxic chemicals, the states are justifiably irate.

Several years ago, the National Academy of Public Administration (NAPA) recommended that EPA continue to devolve authority to the states, but that it adopt a system of "differential oversight," whereby it would give leeway to high-performing states, but keep poor performers on a much shorter leash. NAPA is generally conservative in its outlook, and made this recommendation as part of a study that was funded by Congress. Despite initial enthusiasm for this proposal, EPA has never adopted it. EPA is afraid to target poor state performers in public. To address these problems:

1. Congress and the Obama Administration should impose a system of accountable devolution, periodically evaluating the states and placing them into categories that reward good performance with federal deference but subject weaker state programs to more rigorous review.
2. EPA should also develop a database that closely tracks existing spending and performance by states that are running federal environmental programs.
3. EPA should develop guidelines for state environmental spending that reflect the regulatory burden state agencies must support. EPA should have available teams of personnel able to take over the worst state programs on short notice, using a system of "deterrence-based withdrawal" to motivate states to improve.
4. Congress must appropriate funding sufficient to allow EPA to make these reforms.

It's easy to write a law, and much harder to make sure it is implemented and enforced, fairly and aggressively, throughout our vast country. Governments at all levels struggle to be effective and efficient, and must remain accountable to their citizens. In areas as important as protecting public health and the environment, everyone – no matter where they live – deserves equal protection. Making states responsible for delivering on this crucial goal is a key part of EPA's mission.

**THE ATTORNEYS GENERAL OF
NEW YORK, CALIFORNIA, CONNECTICUT, HAWAII, IOWA,
MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE,
NEW MEXICO, OREGON, VERMONT AND WASHINGTON**

April 17, 2014

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2452 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2463 Rayburn House Office Building
Washington, DC 20515

Re: *The Chemicals in Commerce Act Draft Bill*

Dear Chairman Shimkus and Ranking Member Tonko:

We, the undersigned Attorneys General, write regarding the February 27, 2014, discussion draft bill entitled the Chemicals in Commerce Act (the "TSCA Discussion Draft"), which sets out possible amendments to the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601 *et seq.* ("TSCA").

We join many stakeholders in state and federal government, industry, environmental and public health organizations, and scientific and academic communities in steadfastly supporting efforts to modernize TSCA. The goal of TSCA is to establish an appropriate federal regulatory framework for preventing unnecessary risks of injury to public health and the environment from the manufacture and use of chemicals that present such risks. We recognize the importance of achieving this goal and the critical contribution that TSCA should play in ensuring adequate protection of public health and the environment from toxic chemicals. Unfortunately, in its

current form, TSCA has largely failed to accomplish its crucial purpose. In fact, only a small handful of the approximately 84,000 registered industrial chemicals are currently subject to any federal regulations, and over 60,000 of the registered chemicals have not even been reviewed for safety as mandated by current law.

While we applaud your Subcommittee's interest in reforming TSCA and remedying its well-recognized shortcomings, we are deeply concerned about the TSCA Discussion Draft's sweeping preemption of the authority of states to protect our citizens from the health and environmental risks posed by the production and use of toxic chemicals within the borders of our states. The preemption provisions of the draft bill far exceed the preemption provisions currently in place under TSCA. As discussed more fully below, for chemicals already in commerce, the TSCA Discussion Draft would preempt state regulation of a chemical once the United States Environmental Protection Agency ("EPA") took required action regarding that chemical. For new chemicals, the TSCA Discussion Draft would preempt state regulation of a chemical irrespective of whether EPA took required action regarding that chemical. In addition, the TSCA Discussion Draft would expand preemption to bar states from requesting health or safety information from a company regarding a toxic chemical once EPA has made a risk determination for that chemical. Thus, if enacted, the draft bill's broad preemption language would effectively eliminate the existing federal-state partnership on the regulation of toxic chemicals by preventing states from continuing their successful and ongoing legislative, regulatory and enforcement work that has historically reduced the risks to public health and the environment posed by toxic chemicals.

Our federal laws governing air and water pollution, hazardous waste and pesticides have successfully created a dynamic federal-state relationship in which the authority of states to enact and enforce human health and environmental protections is preserved and thus complements and enhances federal standards. That paradigm should be preserved in any amended TSCA. Thus, consistent with letters that some of the undersigned Attorneys General sent last summer to members of the Senate in connection with S. 1009, we support TSCA reform that would strengthen crucial protections of public health and safety, and the environment, while staunchly opposing any reform that would come at the expense of our states' own ability to protect our citizens and environment from dangerous chemicals, where state action is required to do so.

I. The States' Important Role in Protecting Against the Risks Posed by Toxic Chemicals

The states' responsibilities and powers under our federal system of government include exercising traditional police powers to protect public health and the environment. Historically and currently, states have been leaders in acting to reduce risks to citizens' health and to the environment from toxic chemicals, often acting before the federal government in this regard. For example, Connecticut banned the manufacture and use of polychlorinated biphenyls, or PCBs, two years before EPA's nationwide ban under TSCA. California restricted the use of certain phthalates in children's toys and childcare articles before such chemicals were federally restricted by the Consumer Product Safety Improvement Act, and restricted formaldehyde

emissions from composite wood products years before EPA regulated such products under TSCA. And a number of states, including Iowa, Massachusetts, New York, Vermont, and Wisconsin, instituted broad bans of the toxic pesticide DDT before EPA outlawed non-emergency uses of the chemical under the Federal Insecticide, Fungicide and Rodenticide Act in 1972.

Also, in recent years many state legislatures have introduced or adopted comprehensive chemical management bills, as well as phase-outs of toxic chemicals. Protection of children's health from harmful chemicals has been a particular focus of the states, and many state laws in the area of toxic chemicals have been enacted with strong bipartisan support. *See* Exhibit A (providing examples of state toxics control laws); *see also* Safer States, Safer Chemicals, Healthy Families (Nov. 2010), *available at* www.saferchemicals.org/PDF/reports/HealthyStates.pdf.

II. The Need for TSCA Reform

Congress enacted TSCA in 1976 to give EPA authority to address the risks posed by the production and use of toxic chemicals. But because of limitations in the statute, coupled with lack of adequate funding for implementation, TSCA has largely failed to fulfill its purpose. As a result, our citizens and our environment continue to be exposed to the risks of potentially hazardous chemicals on an ongoing basis, many of which risks are not well understood. As noted above, thousands of chemicals that have never been reviewed for safety are registered for use in the United States.

We believe that strong state and federal efforts are needed to address the risks posed by toxic chemicals. As explained in written testimony that the New York State Attorney General's Office provided to this committee last September, it is important for Congress to amend TSCA to make it more protective of public health and the environment, and also important that any TSCA amendments not expand the preemption of state toxic chemical regulatory and enforcement efforts. However, the preemption provisions of the TSCA Discussion Draft do just that: they would eliminate the states' role in toxic chemical regulation and therefore make TSCA less protective, not more.

III. The TSCA Discussion Draft's Preemption Provisions Imperil Needed Protection

A. Preemption Under TSCA Currently

The TSCA Discussion Draft proposes to greatly expand TSCA preemption, and would serve to cripple states' ability to protect their citizens and the environment from the risks posed by toxic chemicals. Currently, TSCA preempts state regulation only under limited circumstances. TSCA section 18(a)(1)[1] *preserves* state power to regulate a chemical substance,

[1] 15 U.S.C. § 2617(a)(1).

a chemical mixture, or a chemical-containing article *unless* EPA prescribes a rule or order for the substance, mixture or article under TSCA sections 5 or 6.[2]

Even if EPA does prescribe such a rule or order, that EPA action does not necessarily preempt state action. If the state regulation is identical to the EPA rule or order, is adopted under the authority of any other federal law, or bans the use of the substance or mixture in the state, then EPA action does not preempt the state regulation.[3]

In addition, even if the EPA rule or order would preempt a state requirement, TSCA gives a state the power to apply to EPA and obtain an exemption from preemption if the state regulation would not preclude compliance with the EPA regulation, would provide a significantly higher degree of protection than the EPA regulation, and would not unduly burden interstate commerce.[4] Thus, under TSCA, states currently have significant power to regulate toxic chemical manufacture and use in ways that complement and enhance EPA's efforts, as the examples of state action described above demonstrate.

B. Preemption Under the TSCA Discussion Draft

The TSCA Discussion Draft contains preemption provisions that, if enacted, would effectively eliminate the states' power to regulate the manufacture and use of both existing and new toxic chemicals.

Existing Chemicals. Existing chemicals are those already listed in EPA's inventory of chemicals under TSCA section 8(b).[5] For an existing chemical that is actively in use, the TSCA Discussion Draft contemplates a three-step EPA process: (1) EPA determines whether the chemical is "high priority" or "low priority;" (2) if the chemical is high priority, EPA makes a "safety determination" regarding whether the chemical poses an unreasonable risk of harm; and (3) if EPA finds that the chemical poses an unreasonable risk, EPA promulgates a rule establishing restrictions or requirements applicable to manufacture or use of the chemical.[6] As a result, the TSCA Discussion Draft requires EPA to take one of the following three actions for each active existing chemical: determine that the chemical is low priority; determine that the chemical is high priority but does not present an unreasonable risk; or determine that the chemical is high priority and presents an unreasonable risk, followed by promulgation of a rule to regulate manufacture or use of the chemical.

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[2] 15 U.S.C. §§ 2617(a)(2)(B), 2604, 2605.

[3] 15 U.S.C. § 2617(a)(2)(B).

[4] 15 U.S.C. § 2617(b).

[5] 15 U.S.C. § 2607(b).

[6] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a) regarding priority determinations, new subsections 6(b), (c), (d) and (e) regarding safety determinations, and new subsection (f) regarding rules setting requirements or restrictions).

Each of these three actions preempts states from "establish[ing] or continu[ing] in force" any law or regulation that "prohibits or restricts the manufacture, processing, distribution in commerce, or use of [the] chemical substance, mixture or article for its intended conditions of use."[7] Because the TSCA Discussion Draft requires EPA to take one of these three actions for each active existing chemical, all present and future state laws or regulations for each such chemical would eventually be preempted, except for state laws or regulations promulgated pursuant to other federal laws.[8]

This is particularly troubling in the case of chemicals EPA has categorized as low priority. Chemicals may be given that designation even though they pose either a high hazard or a high exposure.[9] And the TSCA Discussion Draft does not require EPA to take any further action on a low-priority chemical.[10] Thus, states would be preempted from protecting their citizens from chemicals that pose either a high hazard or a high exposure that EPA never regulates.

New Chemicals. For new chemicals, once a company has submitted a notification to EPA, the TSCA Discussion Draft contemplates a similar two-step process: (1) EPA determines whether the chemical poses an unreasonable risk of harm; and (2) if EPA finds that the chemical poses an unreasonable risk, EPA promulgates a rule establishing restrictions or requirements applicable to manufacture or use of the chemical.[11]

Under the TSCA Discussion Draft's preemption provision, both of these steps for new chemicals have the same preemptive effect as the three steps for existing chemicals, so no state could "establish or continue in force" any law or regulation governing the "manufacture, processing distribution in commerce, or use" of a new chemical.[12] Moreover, EPA's failure to make an unreasonable risk determination within 90 days also preempts states from establishing or continuing in force any such regulations.[13] Accordingly, since one of these events would

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[7] TSCA Discussion Draft § 17 (proposing new subsections 18(a)(2)(A)(ii), (iii) and (iv)).

[8] TSCA Discussion Draft § 17 (proposing new subsection 18(b) setting out exception to preemption limited to state laws adopted or authorized pursuant to other federal law).

[9] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a)(1)(B), pursuant to which EPA may designate a chemical with a potential for either a high hazard or a high exposure as low priority).

[10] TSCA Discussion Draft § 6(a)(3) (proposing new subsection 6(a)(5)).

[11] TSCA Discussion Draft § 5(a) (proposing new subsection 5(c)(3) & (5) regarding safety determinations and rules setting requirements or restrictions).

[12] TSCA Discussion Draft § 17 (proposing new subsections 18(a)(2)(A)(i) & (iii)).

[13] TSCA Discussion Draft § 17 (proposing new subsection 18(a)(2)(B), which cross-references the 90-day period under new subsection 5(c)(1)).

occur for each new chemical, all present and future state laws or regulations for each such chemical would be preempted, *even where EPA failed to act as mandated by law*.[14]

State Authority to Obtain Information. The TSCA Discussion Draft also would expand preemption of state authority into a new arena: the ability of states to obtain health or safety information about toxic chemicals.[15] Even if EPA has not sought such information, the TSCA Discussion Draft would preempt states from seeking such information if EPA has made a safety determination.[16] But states may have good grounds to seek additional information regarding the health or safety implications of a particular chemical even if EPA has determined that a chemical *does not* present an unreasonable risk, and especially if EPA has determined that a chemical *does* present an unreasonable risk. Information concerning the toxicity of chemicals develops over time, and states should not be foreclosed from obtaining safety information merely because EPA previously made a determination regarding the chemical's safety. This would represent a significant step backward in the realm of the "right to know" about toxic chemicals.

Elimination of Exemptions from Preemption. In addition to expanding the scope of preemption, the TSCA Discussion Draft eliminates two of the three current categorical *exemptions* from preemption, namely, if the state regulation (1) is identical to the EPA rule or order or (2) prohibits the use of the substance or mixture in the state.[17] Without the first of those deleted exemptions, the only means for states to enforce EPA's toxic chemical restrictions would be by citizen suit in federal court, which would deprive states of the critical tool of enforcement by state administrative agencies, the first line enforcers in most states. Removal of the second exemption deprives state residents of additional state-law protection against toxic chemicals when their legislatures or administrative agencies have found sufficient basis to support an in-state ban.

Moreover, the TSCA Discussion Draft eliminates the states' power to obtain exemptions from preemption on a case-by-case basis under TSCA section 18(b).[18] Thus, states would no longer be able to obtain such exemptions, even if the state regulation would provide a significantly higher degree of protection and would not burden interstate commerce.

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[14] As with existing chemicals, state laws or regulations regarding new chemicals promulgated pursuant to other federal laws would not be preempted. TSCA Discussion Draft § 17 (proposing new subsection 18(b)).

[15] TSCA currently preempts states from establishing or continuing in effect requirements for testing a chemical for health and safety effects if EPA has promulgated a rule requiring such testing for similar purposes, 15 U.S.C. § 2617(a)(2)(A), but this provision does not preempt more general requests for health and safety information from states.

[16] TSCA Discussion Draft § 17 (proposing new subsection 18(a)(1)(B)).

[17] *See* 15 U.S.C. § 2617(a)(2)(B) (existing exemptions).

[18] 15 U.S.C. § 2617(b).

IV. The TSCA Discussion Draft's Potentially Grave Impact on State Toxic Chemical Regulation

The TSCA Discussion Draft's preemption provisions would eliminate states' ability to exercise their power to protect their citizens and environment from the dangers of toxic chemicals. Innovative state laws often result in better regulation and more safeguards, especially for vulnerable groups such as children and pregnant women. As noted above, many states have enacted bans or restrictions on the use of toxic chemicals in toys or other items intended for use by, or in households with, children. The preemption provisions of the TSCA Discussion Draft would preempt these important exercises of the states' traditional police powers.

State initiatives have also served as templates for national standards. States have a long history of enforcement of toxic chemical regulatory requirements and contribute a nationwide network of experienced enforcement staff. State regulation and enforcement have not prevented the United States from maintaining its leadership in chemical research and manufacturing, but have helped reduce risk to adults, children and the environment from the manufacture and use of toxic substances.

V. Conclusion

Achieving TSCA's goal of protecting public health and the environment from toxic chemicals is critically important. Preserving the dynamic federal-state relationship that relies on the authority of states to enact and enforce their own protections against those chemicals is a key part of that effort as it complements and enhances TSCA as well as our other national laws governing air and water pollution, hazardous waste, and pesticides.

Accordingly, while we support efforts to improve TSCA, we oppose TSCA reform legislation that includes broad state preemption or otherwise expands the preemptive effect of TSCA. We believe that, rather than bringing TSCA closer to attaining its goal, such provisions would move that goal further out of reach.

We would welcome the opportunity to work with your Subcommittee to craft legislation that provides much-needed TSCA reforms, while preserving the traditional and critical role of states in protecting the health and welfare of their citizens and natural resources.

We thank you for your consideration of our concerns.

Sincerely,

Eric T. Schneiderman
New York State Attorney General

Martha Coakley
Massachusetts Attorney General

Kamala D. Harris
California Attorney General

Joseph A. Foster
New Hampshire Attorney General

George Jepsen
Connecticut Attorney General

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Washington State Attorney General

Douglas F. Gansler
Maryland Attorney General

cc: The Honorable Frederick S. Upton
Chairman, House Energy and Commerce Committee
The Honorable Henry A. Waxman
Ranking Member, House Energy and Commerce Committee

EXHIBIT A

EXAMPLES OF EXISTING STATE REGULATION OF CHEMICAL SUBSTANCES

CALIFORNIA

1. Statewide ban on certain brominated flame retardants used largely in home furnishings (California Health and Safety Code § 108922).

2. Limits on the use of volatile organic compounds (VOCs) in consumer products – a significant cause of ozone pollution, which contributes to high rates of asthma in California (California Code of Regulations, title 17, § 94509).

3. Statewide restrictions on six types of phthalate plasticizers used in toys and childcare articles (California Health and Safety Code §§ 108935-108939).

4. Formaldehyde emission standards for composite wood products (California Code of Regulations, title 17, §§ 93120-93120.12).

5. Proposition 65, a "right to know" law, which has led many manufactures to reformulate their products to reduce levels of toxic chemicals, including the reduction of lead in children's bounce houses, playground structures and play and costume jewelry.

6. The state's Green Chemistry Program, a new and innovative set of laws designed to encourage companies to find safer alternatives for the toxic chemicals currently in their products (Hazardous Materials and Toxic Substances Evaluation and Regulation, Statutes 2008, chapter 559 (A.B. 1879); Toxic Information Clearinghouse, Statues 2008, chapter 560 (S.B.509)).

CONNECTICUT

1. Regulation of cadmium in children's jewelry (Conn. Gen. Stat. § 21a-12d).

2. Prohibition on consumer products with nickel-cadmium batteries (Conn. Gen. Stat. § 22a-256b).

3. Prohibition on sale of zinc-carbon batteries (Conn. Gen. Stat. § 22a-256e).

4. Limits on sale of packaging components composed of lead, cadmium, mercury, or hexavalent chromium (Conn. Gen. Stat. §§ 22a-255g *et seq.*).

5. Prohibition on bisphenol A in reusable food containers (Conn. Gen. Stat. § 21a-12b).

6. Prohibition on bisphenol A in thermal receipt paper (Conn. Gen. Stat. § 21a-12e).

IOWA

1. Ban on sale, distribution, or offering for retail sale of certain household alkaline manganese batteries (Iowa Code §§ 455D.10A(2)(a) and (b)).

2. Restrictions on the sale, distribution, or offering for retail sale of rechargeable consumer products powered by nickel-cadmium or lead batteries (Iowa Code § 455D.10B(1)).

3. Ban on the sale, offer for sale, purchase, or use of plastic foam packaging products manufactured with chlorofluorocarbons or halogenated chlorofluorocarbons (Iowa Code § 455D.14).

4. Restrictions on offering for sale certain mercury switch thermostats (Iowa Code § 455D.16(6)).

5. Restrictions on the sale, distribution, or offering for promotional purposes a package or packaging component which contains lead, cadmium, mercury, or hexavalent chromium (Iowa Code § 455D.19(3)).

MARYLAND

1. Regulation of products with brominated flame retardants (Md. Code Ann., Envir. §6-1202).

2. Ban on manufacture and sale of lead-containing children's products (Md. Code Ann., Envir. § 6-1303).

3. Regulation of cadmium in children's jewelry (Md. Code Ann., Envir. § 6-1402).

MASSACHUSETTS

1. Ban under the MA Mercury Management Act (Ch. 190 of the Acts of 2006, amending MA General Laws Ch. 21H), on the sale of certain mercury-added products, such as, without limitation and subject to certain exemptions: thermostats; barometers; flow meters; hydrometers; mercury switches; and mercury relays (310 C.M.R. 75.00).

2. Regulation of certain lacquer sealers and flammable floor finishing products, including clear lacquer sanding sealers (MA General Laws Ch. 94, § 329).

3. The state's comprehensive chemicals management scheme that requires companies that use large quantities of particular toxic chemicals to evaluate and plan for pollution prevention, implement management plans if practical, and annually measure and report the results (MA General Laws Ch. 211).

4. MA General Laws Ch. 94B Hazardous Substances Act, providing for ban of any toy, or other article intended for use by children, which contains a hazardous substance accessible to a child, or any hazardous substance intended or packaged in a form suitable for use in households (105 C.M.R. 650.000).

NEW YORK

1. Ban on bisphenol A in child care products (N.Y. Envtl. Conserv. Law §§ 37-0501 *et seq.*).

2. Ban on the flame retardant tris(2-choloroethyl) phosphate (TRIS) in child care products (N.Y. Envtl. Conserv. Law §§ 37-0701 *et seq.*).

3. Restrictions on the concentration of brominated flame retardants in products (N.Y. Envtl. Conserv. Law § 37-0111).

4. Restrictions on the use of lead, cadmium, mercury, or hexavalent chromium in product packaging (N.Y. Envtl. Conserv. Law §§ 37-0205 *et seq.*).

5. A ban on the import, sale or distribution of gasoline containing methyl tertiary butyl ether (MBTE) (N.Y. Agric. & Mkts. Law § 192-g).

6. Restrictions on the phosphorus content of household cleaning products, and on the sale and use of phosphorus lawn fertilizers (N.Y. Envtl. Conserv. Law §§ 17-2103, 35-0105(2)(a)).

7. A *de facto* ban on the use of n-propyl bromide in dry cleaning; New York will not issue an air facility registration to any facility proposing to use n-propyl bromide as a dry cleaning solvent (New York State Dept. of Envtl. Conservation, Approved Alternative Solvents for Dry Cleaning, *at* http://www.dec.ny.gov/chemical/72273.html).

OREGON

1. Ban on any product containing more than one-tenth of one percent by mass of pentabrominated diphenyl ether, octabrominated diphenyl ether and decabrominated diphenyl ether, flame retardant chemicals (ORS 453.085(16)).

2. Ban on art and craft supplies containing more than one percent of any toxic substance, as identified on a list of hazardous substances promulgated by rule (ORS 453.205 to 453.275).

3. The Oregon Health Authority ("OHA") may ban from commerce products that contain hazardous substances that OHA concludes are unsafe, even with a cautionary label, and can ban toys or other articles intended for use by children that make a hazardous substance susceptible to access by a child (ORS 453.055).

4. Ban on mercury use in fever thermometers, novelty items, certain light fixtures, and commercial and residential buildings (exceptions not referenced; ORS 646.608, 646A.080, 646A.081, and 455.355).

VERMONT

1. Ban on lead in consumer products (9 Vt. Stat. Ann § 2470e-*1*).

2. Ban on brominated and chlorinated flame retardants (9 Vt. Stat. Ann. §§ 2972-2980).

3. Ban on phthalates (18 Vt. Stat. Ann. § 1511).

4. Ban on bisphenol A (9 Vt. Stat. Ann. § 1512).

5. Ban on heavy metals in packaging (10 Vt. Stat. Ann. § 6620a).

6. Comprehensive mercury management (10 Vt. Stat. Ann. ch. 164).

7. Ban on addition of gasoline ethers (including MTBE) to fuel products (10 Vt. Stat. Ann. § 577).

WASHINGTON

1. Ban on the manufacture; distribution or sale of certain products containing polybrominated diphenyl ethers (Wash. Rev. Code § 70.76).

2. Ban on the sale or distribution of sports bottles, or children's bottles, cups, or containers that contain bisphenol A (Wash. Rev. Code § 70.280).

3. Ban on distribution or sale of children's products containing lead, cadmium and phthalates above certain concentrations (Wash. Rev. Code § 70.240).

4. Ban on the sale or distribution of certain products containing mercury (Wash. Rev. Code § 70.95M.050).

Mr. SHIMKUS. Thank you, Ms. Steinzor.

I am going to start just by making a statement. You made some assumptions as to why or why we didn't call this hearing, but I don't remember you ever asking me, the chairman of the subcommittee, why I called it. So just in future times you come before us, if you want to know why, come ask me. Don't make an assumption and weave a story that may or may not be true.

Mr. Meltz, for nonlawyers like me, could you please explain the difference between the Supremacy Clause and the Commerce Clause and how preemption in Federal environmental law is constitutionally based?

Mr. MELTZ. Well, the Supremacy Clause in Article 6 says that the Federal law is the supreme law of the land, so that when there is a conflict, either express or implied or in fact, the non-Federal law has to give way to the Federal prescription.

Preemption considerations arise in just about every Federal environmental law I have ever encountered. In fact, I have a CRS report compiling all the preemption provisions in all the environmental statutes, and they run the gamut from total preemption—a State cannot act, and there is no waiver even—all the way to the other extreme, where the State has complete freedom to do what it wishes, whether or not the Federal Government acts.

So, depending on the circumstances, Congress has seen the full gamut of possibilities appropriate.

Mr. SHIMKUS. Hence the dilemma and why we have you here today, to help us try to figure out that.

Professor Adler, how is it that in some ways an historical accident—that is, leadership in environmental policy—was supplanted by Federal regulation?

Mr. ADLER. That is a long subject, and——

Mr. SHIMKUS. Well, don't be too long.

Mr. ADLER. Yes. And given that I live in Cleveland, it is a somewhat of a, I guess, a personal subject given that an infamous fire on the Cuyahoga River is often credited with helping to drive the enactment of many Federal environmental statutes.

And just to use as an example, that event in June of 1969 was seen as evidence that most measures of environmental quality were getting much worse, that State and local governments were not acting, and that, therefore, Federal intervention was necessary.

But when one looks at the historical record, that, in fact, isn't true. If one just looks at the case of river fires, river fires on the Cuyahoga River, in Michigan and Pennsylvania and Maryland, all throughout the country, had actually at one point been common throughout the late 19th and early 20th century. Rivers used for industrial purposes were often dumping grounds for various flammable and other wastes. And it was a problem that was easily identified and one that State and local governments readily addressed.

If one looks at water pollution more generally, one sees that States in the 1960s were becoming very active in enacting water pollution control statutes. We see a similar pattern in air. California, in particular, was quite aggressive. And measures of things like ambient air quality for the pollutants with the greatest health

effects that were understood at the time were actually declining before Federal environmental statutes were enacted.

So whether we think these Federal environmental statutes are good or bad as a matter of policy, the general story that we tell, that they were necessary to stem a precipitous decline in environmental quality that was occurring in the late 20th century, just doesn't square with the actual historical record.

Mr. SHIMKUS. So is it safe to say that it is under your opinion that the environmental policy might be improved if States regained a more historic role?

Mr. ADLER. Sure. I think that if both State Governments and the Federal Government are able to focus on those areas where they have comparative advantage, we would improve the overall levels of environmental protection. It would be both more efficient and more effective.

In areas like interstate spillovers, as has already been discussed, the downwind State can't do anything about an upwind State's pollution. And as we look at the history of things like the Clean Air Act, those sorts of concerns have been the focus of a tiny fraction of EPA's time and effort and a tiny fraction of what is actually in the U.S. Code.

And if we stood back and actually tried to rationalize where is Federal intervention truly necessary and where can State and local governments take the lead, I think we would have a more rational, more efficient, less costly, and more effective approach to environmental protection.

Mr. SHIMKUS. Thank you.

Professor Revesz, you noted at the end of your statement about the national fuel efficiency standard for cars, California differently from other States, but you did not seem to defend the decision with the policy on constitutional rationale. Do you have one?

Mr. REVESZ. The decision for California to have different standards than the Federal standards?

Mr. SHIMKUS. Yes, sir.

Mr. REVESZ. It is a historical accident. I mean, clearly, Congress has the authority to allow States to do that. I don't think there is any serious constitutional argument that somehow or other once the Federal Government acts it needs to preempt more stringent State standards.

The reason the California standards are more stringent is because in 1970, when the Clean Air Act was enacted, California already had State standards for automobiles, and Congress decided not to preempt those standards and did it as a matter of policy. And it was actually not——

Mr. SHIMKUS. Yes, let me just jump in. Do you think it is fair for Congress to discriminate among States in its regulation of trade in the same articles?

Mr. REVESZ. Well, as a practical matter, Congress gave other States the choice to choose the California standards or the Federal standards. So, basically, every State could do something. It is true that they couldn't pick other standards.

But I think Congress had good reason for doing that, and I think it is definitely constitutional for Congress to do it. I don't think there is a serious constitutional argument that would stand in the

way of Congress making those distinctions if it thought that they were good as a matter of policy. They would need to think they are good as a matter of policy for this to actually be a good idea.

I think in that particular case, given the history of that provision, it made sense for Congress in 1970 to do what it did. And it was not a controversial issue then; there was strong bipartisan support for that provision.

Mr. SHIMKUS. Great. Thank you.

The Chair now recognizes Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair.

On many issues within this subcommittee's jurisdiction, the States have led the way. When risks are not adequately addressed at the Federal level, State protections are essential. My home State of New York has taken significant steps to protect its citizens and its resources from DDT, MTBE, flame retardants, risks posed by hydraulic fracturing, or fracking.

I served in the New York State Assembly for some 25 years, so I have a strong appreciation for the work of State Governments to protect the environment. But there is also an important role for the Federal Government in environmental protection, ensuring a minimum level of protection for all citizens. A cooperative approach, where the Federal Government sets a floor and States remain free to set more stringent standards, has proven effective and successful.

Ms. Steinzor, can you briefly describe the principles of cooperative federalism in environmental law, please?

Ms. STEINZOR. Yes.

Environmental law has set up a system where the States can apply to be delegated to have authority to implement the law. As was mentioned earlier, 96 percent of the environmental programs covered by these laws have been delegated to the States.

So EPA sets the Federal standards by which we operate, and then the States implement the law. Most of these laws say the States can enact more stringent provisions if they want to. And the States also receive financial support for implementing their programs.

Because the States are volunteering to do this, there are no constitutional impediments. The main impediment, constitutionally, is that the Federal Government is not allowed to commandeer a State Government's resources. And we saw that in the New York v. United States case that I mentioned in my written testimony.

Mr. TONKO. Uh-huh.

Ms. STEINZOR. So what we have is a situation where the States and the Federal Government have gotten married, and, like most marriages, there are points of friction and differences. I am not going to pretend that these partnerships are always happy, especially when there is money lacking. And I think that is a problem at both the Federal- and the State-level resources.

Mr. TONKO. Thank you.

Have recent proposals from this committee comported with those principles?

Ms. STEINZOR. I actually do not think that the effort to preempt all State law under the Toxic Substances Control Act is consistent with those principles. The Toxic Substances Control Act is imple-

mented primarily by EPA, but States are allowed to do more stringent laws, as you just mentioned.

And the States resent become being preempted precisely because of what Professor Adler said, which is that they want to make sure that they are not following a one-size-fits-all, they want to tailor the requirements, and so they home in on problems that are specific to their State and take whatever action they think appropriate.

And you have a letter from attorneys general in several States that is attached to my written testimony that explains these principles.

Mr. TONKO. Uh-huh.

Well, I was particularly concerned by the preemption provisions in the majority's draft bill to amend TSCA, as you focused on that issue. The draft bill could have had widespread impacts on State laws, including laws on fracking. More than 20 States have new enacted laws or regulations requiring some level of public disclosure of the chemical contents of hydraulic fracturing fluids. Other States have successfully imposed requirements for groundwater testing and restrictions on disposal of flow-back water and even prohibitions on the use of certain chemicals.

Ms. Steinzor, does the Commerce Clause require that preemption?

Ms. STEINZOR. Absolutely not.

Mr. TONKO. Is there any constitutional provision that necessitates that preemption?

Ms. STEINZOR. Absolutely not.

Mr. TONKO. Do you have concerns about the effects of broad preemption in TSCA reform on State fracking laws and other environmental protections?

Ms. STEINZOR. Yes, I do. I think that it would be extremely unwise to stifle the States in this way and that actually preempting them in such a harsh manner contradicts all the other discussion about letting them have a greater role in environmental protection. Right now, we have a cooperative partnership. This would make the partnership completely one-sided and kick them out of the field.

And fracking is just an example of an emerging problem where they have been able—as we have called them in the past, laboratories of democracy—they have been able to step forward and be creative and lead the way for the Federal Government.

Mr. TONKO. Thank you very much.

I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

For the sake of keeping peace on my side, the Chair is to recognize Mr. Whitfield, but I am going to ask unanimous consent that the gentleman from West Virginia go out of order for his 5 minutes. Is there objection?

OK. The Chair recognizes the gentleman from Kentucky.

Mr. WHITFIELD. You all are so nice. Thank you very much.

Well, I would like to thank the panel for being here today.

And I am going to approach this a little differently. As you know, President Obama has been under a lot of criticism lately of deciding which laws he will try to prosecute and which laws he will not

prosecute. And, as you know, the House of Representatives now is considering a lawsuit, but because of the standing issue, it is very difficult to bring those lawsuits on the behalf of Congress as an institution.

But what made me think a little bit about this was Ms. Steinzor, in her opening statement, talked about the unreconcilable positions that Congress is in right now as it approaches reauthorization of TSCA, doing one thing, and addressing the coal-ash-regulation issue by doing another thing. And she said that the only—to read her language here, "They have consistent pragmatic outcomes. These are unreconcilable positions, and the only outcome is that they help big business." So the assumption here is that the Republican Congress is doing this because it helps big business.

Well, it raised an issue with me, in that she is talking about two laws here, that we have not reauthorized TSCA yet, and we have not been able to pass legislation the way we would like to on coal ash yet by the Congress.

But the Migratory Bird Act, for example, is a Federal law, and there is a Federal law that protects golden eagles and bald eagles. And yet this administration, with the spill in the Gulf in the latter part of the Bush administration, the Federal Government instituted a fine of $100 million against British Petroleum for killing migratory birds in that spill. And yet this administration has granted an exemption from the Migratory Bird Act and the Golden and Bald Eagle Protection Act to windmills.

So it appears that this administration, rather than just being in favor of big business in general, it is determined upon whether or not they like the big business. And, for example, Google is a large company that is taking advantage of some Federal tax codes to invest in the wind industry.

And so, for this administration to basically say we are not going to enforce, we are going to grant exemptions to certain big businesses from the Migratory Bird Act and the Golden and Bald Eagle Protection Act—I would ask if any of you would like to make a comment on that, how this administration has—we have two Federal laws, and this administration has affirmatively said we are going to grant exemptions from these Federal laws for certain industries that we agree with what they are doing.

You don't have to comment.

Mr. SHIMKUS. You can offer to answer it, or you can pass.

Mr. ADLER. I will just say briefly that, as a general matter, if the executive branch believes that certain industries or activities should be exempt from Federal regulation, as it is currently written, they should either, if it is legal, redraft the existing regulations and repromulgate them or they should ask Congress to amend the law, and that disparate application of existing laws and regulations to different industries based on their political or other characteristics is not the sort of thing any executive branch should engage in.

Mr. SHIMKUS. The gentleman from Kentucky?

Mr. WHITFIELD. I yield back.

Mr. SHIMKUS. The gentleman yields back the time.

The Chair now recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman, for holding the hearing today on this important issue.

I would like to also thank our distinguished panelists for joining us this morning.

States play an essential role in environmental regulation, creating specific requirements to reflect the reality of circumstances in each State. But there is an important role for the Federal Government as a partner.

Like my colleague from New York, I served 20 years in the State legislature in Texas and am familiar with our relationship with EPA and TCEQ. I used to joke, it must be in Texas' DNA to complain about the EPA literally from my first term in 1973. But this issue, it has been cooperative.

In fact, one of my frustrations 2 years ago, that the State of Texas decided not to issue carbon-based permits because of politics, and so we ended up having them issued through EPA, which delayed those permits months, if not years. We are working through that backlog. The most recent legislative session corrected that. And so now our Texas Environmental Quality Commission is actually doing what they should be doing, because it is a cooperative basis.

Mr. Meltz, do you agree that, generally, environmental regulation is done in a partnership with States and the Federal Government?

Mr. MELTZ. I agree that that has been the pattern of Federal enactments, and——

Mr. GREEN. OK. Yes, generally, EPA sets some standards, and the State then negotiates with the EPA on how they can reach those standards.

Mr. MELTZ. With many of the statutes, not all, yes.

Mr. GREEN. Is there anything in the Constitution or caselaw that says regulation can't be done that way, as a partnership?

Mr. MELTZ. Nothing in the Constitution, no.

Mr. GREEN. OK.

I would like to turn a minute to the Superfund statute, which has played an important role in our district in cleaning up the San Jacinto Waste Pits. Our office has worked with both the State of Texas and Harris County and EPA to get that site listed on the national priority list. And, most recently, we sent a letter to EPA calling for more environmental protective remediation to be taken at the site. This is a clear example of local and Federal officials working together to protect a local community and ensure that taxpayers don't bear that cleanup cost.

Mr. Meltz, in your testimony, you mentioned that challenges have been brought alleging that Superfund and other environmental statutes were not authorized by the Commerce Clause. Is that correct?

Mr. MELTZ. Yes. That has been—yes. Several statutes.

Mr. GREEN. OK. And courts have found these statutes, including Superfund, are constitutional, correct?

Mr. MELTZ. Yes. The one exception has been the challenges to the Corps and EPA, expansive definition of waters of the United States under the Clean Water Act to include isolated waters and remote adjacent wetlands, yes.

Mr. GREEN. OK.

You know, again, my experience, both as a State legislator and in Congress, when there was a need for a Superfund site, I was actually first approached by the State of Texas. And I know there were some issues a few months ago in Congress about, you know, the States not being a part of it. Believe me, we have a dioxin facility that was there before we had an EPA. And our States are typically the ones that are more proactive, at least in Texas.

Now turning to Ms. Steinzor, do you agree that the constitutional footing of the Superfund is strong?

Ms. STEINZOR. The—I am sorry, sir.

Mr. GREEN. The constitutional footing of the Superfund——

Ms. STEINZOR. Yes.

Mr. GREEN [continuing]. Is strong.

Ms. STEINZOR. I do agree to that.

Mr. GREEN. OK. I have a few questions for Mr. Revesz.

Mr. Revesz, in your testimony, you agreed that it is prudent policy of the Federal Government to preempt State regulation on goods that exhibit significant economies of scale and production, such as cars and pesticides.

Mr. REVESZ. That is right.

Mr. GREEN. OK. Do you believe that industrial chemicals such as those that are regulated under the Toxic Substance Control Act also exhibit significant economies of scale and production?

Mr. REVESZ. It is an empirical question. Many probably don't. Some might.

And I think to justify preemption and to display State autonomy, to display the State's ability to protect their citizens at a level that is more stringent than what the Federal Government can do nationwide is a big decision and should only be done if the empirical evidence is very compelling.

I believe, in the case of cars, it is quite compelling, and Congress has acted accordingly since 1970. I don't think it is compelling in the case of every product.

I don't think it is compelling in the case of every product that is regulated under the Toxic Substance Control Act. So I don't think that across-the-board preemptions without empirical justification would be justified.

Mr. GREEN. Well, do you believe that industrial chemicals such as under the Toxic Control Act—would you agree that the argument for Federal preemption in a State regulation is strongest when its Federal standards are regulating the consequences of these products themselves?

Mr. REVESZ. Well, I think we are talking about a situation where there is Federal regulation—Federal substantive regulation and where the States are trying to regulate the same product in a more stringent way.

Clearly, less stringent State regulations would be preempted. So if the States are trying to regulate the same product in a more stringent way, the propriety of Federal preemption would depend on the strength of these economies of scale.

And it is—as a result, it is not a question that can really be answered across the board. It would have to be examined, basically, industry by industry or compound by compound.

Mr. GREEN. Mr. Chairman, I appreciate your patience. Although, if we are going to do cars, then why shouldn't we do bleaches and other things that have some national standard?

I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Does the gentleman from Ohio want to go?

Mr. LATTA. Mr. Chairman, I thought you said you were recognizing the——

Mr. SHIMKUS. No. Let's go. We are running out of time.

Mr. LATTA. Thank you very much, Mr. Chairman.

Professor Adler, if I could start the question with you.

In your testimony, you discussed a proposed policy of ecological forbearance under which States could petition Federal agencies for waivers from Federal requirements where there are no compelling reasons to enforce the Federal rule.

Can you think of a current example where this would be applicable in the State of Ohio or elsewhere?

Mr. ADLER. Well, I think there are lots of areas where State regulators have complained that they are forced, as part of the existing regulatory structure, to devote time and resources to meeting standards or fulfilling requirements that aren't of particular importance in that State.

One of the most obvious areas where this occurs is under the Safe Drinking Water Act where you have requirements to test for certain substances or to bring levels of certain contaminants below Federally approved levels. That may or may not be the greatest concern in particular local areas.

And sometimes this has led to some States even challenging the listing of such substances. The State of Nebraska, for example, challenged the tightening of Federal standards for arsenic, arguing both that this was not a serious health concern for people in Nebraska, but, secondly, insofar as this would increase the costs of providing water through regulated water systems, this would drive many consumers, particularly those in lower incomes, to opt out of using water systems and use unregulated well water, which in many cases would actually be more risk—more dangerous to public health.

Nebraska, therefore, sued, arguing—and it failed in its lawsuit, but I think that is an example of where States will sometimes have very good reasons for wanting to devote their resources to a different set of environmental priorities than what is specified under Federal law.

And it would be good if there is a mechanism whereby States could seek relief from Federal requirements so that they may devote their resources in ways—or to problems that are of greater concern to their citizens and are in alignment with what the demands of local citizens are.

We don't now really have a mechanism that is very effective at doing that. And so, in my testimony, I suggest an idea that has also been suggested by Professor Farber at the University of California at Berkeley of one way of giving States the opportunity for that kind of flexibility.

Mr. LATTA. Let me follow up.

Also, is there empirical evidence to support the assertion that leaving environmental regulation to the States will precipitate a race to the bottom?

Mr. ADLER. No. There actually really isn't such evidence. There is one study that relies upon survey data that shows that State regulators are responsive to competitive concerns, but that is not sufficient to show there is race to the bottom.

Professor Revesz has written what is probably the seminal article on the theoretical arguments related to race to the bottom, I think showing quite compellingly that, as an analytical matter, the "race to the bottom" theory rests on a lot of a assumptions that are hard to justify.

As an empirical matter, I have done work in the area of wetlands, showing that the pattern of State wetland regulation prior to Federal regulation is the exact opposite of what the "race to the bottom theory" would predict.

There is a significant amount of literature in both the economic literature and the political science literature looking empirically at patterns of State regulation, again showing that the patterns of State regulation are not consistent with the idea of a race to the bottom.

And, in fact, there is some scholarship that suggests that States, in fact, learn from each other and that, when one State, whether it is California or New York or what have you, regulates more stringently or to enhance environmental protection, that neighboring States become more likely to follow suit and more likely to increase their levels of environmental protection as well as they learn from the positive experience of their neighbors.

And then there is also some work—I have done some work and others have done work about suggesting that even non-preemptive Federal regulation alters the incentives that State regulators face and, in some cases, will discourage States from being innovative and being more aggressive and experimental in trying to address environmental problems because of the way it alters the political and other incentives for State action.

So even non-preemptive Federal regulation can discourage States from being the laboratories of democracy that we would like them to be.

Mr. LATTA. Thank you very much, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman yields back.

The Chair now recognizes the gentleman from California, Mr. McNerney.

Mr. MCNERNEY. Thank you, Mr. Chairman.

Mr. SHIMKUS. You are welcome.

Mr. MCNERNEY. Ms. Steinzor, have you ever heard of the word "chemical trespass"—the term?

Ms. STEINZOR. I am actually not familiar with that.

Mr. MCNERNEY. OK. Professor Revesz, you discussed fracking and the fugitive emissions of methane.

Is the commerce clause broad enough, in your opinion, to permit the EPA—or the Federal Government to regulate fugitive emissions of methane?

Mr. REVESZ. Oh, definitely. The—I mean, fugitive emissions of methane are an interstate problem. They are actually a global problem. They would affect the negotiating posture of the United States in climate change negotiations.

I don't think there is any plausible argument that would stand in the way of Congress choosing to act to regulate those emissions, should Congress choose to do that.

And, moreover, I think that, because of the significant interjurisdiction externalities posed by fugitive emissions of methane as a matter of policy, there is a very compelling reason for congressional action.

Mr. MCNERNEY. Thank you.

Professor Steinzor, could you describe how the States and the Federal Government work together to implement Federal environmental programs.

Ms. STEINZOR. Yes. The States have delegated authority to implement the programs so they work closely with EPA. EPA will set the minimum standards of what kind of protection is offered.

And then the States write permits or otherwise take enforcement action against regulated entities to make sure they comply with those standards.

And most of them are based on the protection of public health or the environment, and many have a cost-effectiveness requirement.

Mr. MCNERNEY. Thank you.

Mr. Meltz, regarding this model that was just described, in your opinion, does the case law call into question this model of environmental cooperation?

Mr. MELTZ. Absolutely not. It is well established. It has been going on at least since 1970. And States, of course, have their own inherent police power to deal with these environmental problems. It is not that they get their authority to do so from the Federal Government.

It is just that the Federal Government can set preemptive standards and then allow States to come in with their own programs and run the program within the State, if they would rather. But States have their own inherent authority, if not preempted.

Ms. STEINZOR. That was a great clarification.

Mr. MCNERNEY. I will yield the rest of my time to the gentlewoman from Colorado.

Ms. DEGETTE. Thank you very much in the effort of efficiency.

Mr. Chairman, first of all, I apologize for being late. We had a hearing upstairs on 21st Century Cures, which, as you know, I am the cochair with Chairman Upton.

But I do want to take a minute to welcome Dean Revesz here. He is the dean of my alma mater—the dean emeritus of my alma mater, NYU law school, and he did a wonderful job when he was dean.

Mr. SHIMKUS. That might make me reconsider a next invitation. So I am not sure that is helpful.

Ms. DEGETTE. I knew that that would be, and that will save him a trip down here. So it is all good.

Dean Revesz, I just wanted to ask a follow-up question to what you were talking to Mr. Green about, which is, really, the propriety

of the Federal Government preempting State laws. What you were saying is oftentimes it is an economy of scale issue and what is the specific State concern.

I am wondering how we, as Congress, can take that sort of general principle into consideration as we really look at fracking legislation or Tosca or all of the other issues we have been talking about this morning. How do we weigh those equities?

Mr. REVESZ. Well, it is a hard question, and you have a hard job.

But there are some important guidelines. I mean, first, there is a significant distinction between product standards and process standards.

The economies of scale argument really doesn't apply to process standards. You know, process standards can be very different across the country and products can still trade in national markets.

So tracking the process standards, you don't have to worry about that. You know, whether its action is good or bad will have to be decided on other reasons, but you don't have to worry about the economy of scale.

For products, you might have to. I mean, generally, bigger isn't always better. And, you know, we know that in all kinds of contexts.

So I think some categorical boxes are fairly clear to draw. And you can learn about the manufacture of cars. It probably won't take that long to figure out that there are significant economies of scales.

For most products—you know, products are produced in the centralized way across the country, product economies of scale are less.

And you can also give some flexibility to the Federal regulator. Often these standards are going to be set by Federal regulators and there can be some flexible mechanisms, including some cooperative flexible mechanisms where they can work with the States.

So I think you can make some broad generalizations, delegate some authority to do the Federal regulators, and then have them work cooperatively with the States. You will probably end up with an outcome that is pretty good.

Ms. DEGETTE. Thank you very much.

Mr. SHIMKUS. I want to thank my colleague.

There is 11 minutes left before the vote is called.

I want to recognize the gentleman from West Virginia for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman.

I will try to be brief. I have many more questions here to ask with this, but given the time frame with it—Mr. Chairman, with all due respect to your expectations at this hearing, I really would like to ask Ms. Steinzor some other questions, especially after your testimony that you said that industry is browbeating the EPA.

Is that a fair statement of what you said?

Ms. STEINZOR. Yes. I believe that is a fair statement.

Mr. MCKINLEY. Do you think that Congress is also pushing back against the EPA in a browbeating way?

Ms. STEINZOR. Yes.

Mr. MCKINLEY. I find that pretty incredible.

That is why I like these discussions. We get off game here a little bit because I know he had intention, but here is a chance for us to have a dialogue about that because, quite frankly, many of us think that the EPA is a bully in the playground.

It is imposing things on small individuals, small farmers, individuals, and we are trying to be their voice. We are trying to raise the awareness around the country that the EPA is overextending its bounds.

So I am glad that you think that we are because it helps me understand a little bit better where you are coming from, whatever adjective we want to add to that.

Do you think the EPA wage garnishment is fair, is right?

Ms. STEINZOR. I am not familiar with the circumstances where that happened.

Mr. MCKINLEY. Do you think the navigable waterways on our agricultural farms—do you think that is fair, their ruling?

Ms. STEINZOR. I actually think——

Mr. MCKINLEY. Just a "yes" or "no," given the time.

Do you think it is "yes"? I am hearing a "yes."

I heard that—on coal ash, did you even read the bill?

Ms. STEINZOR. I am sorry?

Mr. MCKINLEY. We passed it four times, by the way. The Senate is not taking the coal ash bill up. We could have resolved this issue, and the North Carolina situation probably would not have happened if the Senate had taken that bill up.

So we are trying to work with that—the Congress has actually—the House is actually working a way to try to address this problem, and the Senate, because of an ideology, is preventing that from going forth.

So, apparently, you are not aware.

Ms. STEINZOR. I am very familiar with the coal ash bill. I don't think it would have solved the problem in North Carolina.

Mr. MCKINLEY. Oh. You don't think the collapse of the dam——

Ms. STEINZOR. I don't think so, because you would have left it to North Carolina at the State level.

Mr. MCKINLEY. Well, you are not an engineer. So I can't image you would understand that.

What about Spruce Mine? Do you think it was appropriate that the EPA has the ability to withdraw—retroactively withdraw a permit?

Ms. STEINZOR. I am not familiar with that situation.

Mr. MCKINLEY. What I am pointing out—and this is what America needs to understand—that is why we are pushing back against this bully in the playground.

These are just examples of things that the EPA is doing to our community, our businesses, our farms, all across America, and someone has to stand up to them.

Because individuals like the Alts over in eastern panhandle or the Sacketts out in Idaho, they don't have the resources. They need somebody here in Congress to stand up and push back against this bully.

Have you ever experienced a bully?

Ms. STEINZOR. Yes, I have.

Mr. MCKINLEY. Then, you understand. You ought to be able to relate to that, about someone in the power——

Ms. STEINZOR. I disagree that EPA is a bully.

Mr. MCKINLEY. You do you agree that EPA is a bully?

Ms. STEINZOR. I do not agree that EPA is a bully.

Mr. MCKINLEY. Oh. OK. Well, I guess that is why we are just going to disagree with that.

But, nevertheless, many of us perceive that, when we see them attacking industries, attacking families and their farms, we are talk—individuals trying to—in Idaho—I could go on and on with examples of that.

I do hope you do get another chance to read the Fly Ash Bill because we passed it four times and we think it will address that.

Actually, the EPA supports this legislation. They've indicated that they find it a workable document. If you are not aware of that, you might want to check into that a little bit.

And the President did not issue a veto threat with that. So this was a document that could have gone to save that problem—prevent that problem. But because of the ideology of people in the other body, apparently, they didn't want to do that.

So I am sorry. In deference to time, let me not waste any more. And I yield back the balance of my time.

Mr. SHIMKUS. The gentleman yields back his time.

We want to thank the panel. There is still about 6 minutes left before we need to get to the floor. We talked about the time frame beforehand. So we are going to adjourn this in a minute. We are not going to call you back.

Be prepared for some folks to follow up with questions. And if you would respond. You know, we try to primarily focus on the questions when should Congress consider acting and who should be the regulator.

You got some very good questions. I was hoping for clarity. I think I got more confusion. But I guess that is what you guys live with and ladies live with when you deal with constitutional law and States' rights and the like.

This was helpful to me. I appreciate your attendance.

With that, I am going to call the hearing as adjourned.

[Whereupon, at 10:32 a.m., the subcommittee was adjourned.]

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